TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 743.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ASA P. CARNAHAN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED DECEMBER 6, 1915.

(25,026)

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
v.
ASA P. CARNAHAN.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The petition of The Chesapeake and Ohio Railway Company, a corporation chartered under the laws of Virginia, respectfully represents that it is aggrieved by a final judgment of the Circuit Court of the County of Hanover, rendered on March 25th, 1914, in an action of trespass on the case wherein Asa P. Carnahan was plaintiff and your petitioner was defendant, in favor of the said Carnahan against your petitioner, upon the verdict of a jury, for $25,000 damages.

Statement of the Case.

Herewith presented is a transcript of the record in said action from which it appears that Asa P. Carnahan, hereinafter spoken of as the plaintiff, was a fireman in the employment of your petitioner, hereinafter spoken of as the defendant, and that he lost his leg in a collision between a train of the defendant and certain cars belonging to the defendant, situated on its track at Doswell, Virginia, on March 7th, 1913.

The plaintiff was a fireman on train No. 97, Engine No. 199, in charge of Engineman E. L. Bailey and Conductor William McGraw, which left Richmond at 12:40 A. M. March 7th, 1913, West bound.

2 This train, besides the engine and tender, consisted of seven empty tourist sleepers, six of which were being moved "deadhead" (i. e. without passengers or freight) from Richmond, Virginia, to Cincinnati, Ohio. The seventh tourist sleeper on this *car* was to be delivered to the Kanawha & Michigan Railway at Charleston, West Virginia.

It appears that an extra train of defendant known as Extra 596 West, in charge of M. E. Lane and Conductor J. B. Shisler had some time previously moved from Richmond, Virginia, to Doswell, Virginia, with several loaded cars to be delivered to the R. F. & P. R. R. Co. at Doswell, Virginia (a junction point with said railroad) with instructions to pick up certain empty coal cars of the defendant which were at Doswell, Virginia, and bring them to Richmond. At the time of the collision wherein the plaintiff suffered the injuries of which he complains, this latter train had carried and delivered its loaded cars at Doswell, and was collecting the empty cars referred to upon the main track at Doswell, preparatory to forming a train of said empty cars to be hauled back to Richmond to be designated as Extra 596, East.

The train upon which Carnahan was fireman, known as Train No. 97, Engine 199, arrived at Doswell about 2 o'clock A. M. Upon approaching Doswell and before crossing the tracks of the R. F. & P. R. R. Co. at that point it received a signal to stop operated by the telegraph operator in the tower at that point.

Referring to this signal the plaintiff said (Written record, p. 19):

"We stopped, on the red signal, I should say six or seven minutes; by the time we got the white signal (the signal to proceed) the engineer used the proper signal to call the flag in (i. e. the flagman protecting his train) and the flagman came in and the proper signal was answered and we proceeded with a clear signal. There was no signal for orders. Under those signals, that is, the signal we got, we are supposed to have the main line movement and the right of tract for 27 miles."

What the plaintiff meant was that the train had been held up some time by a signal which prevented it proceeding and that after being there six or seven minutes this signal was withdrawn and a signal given to proceed which indicated to the trainmen that the road ahead was clear, and that there were no signals given indica-
3 tive that the train was to receive any orders at that station.

The signals given, however, did not relieve Carnahan or any of the train crew of his train from the duties ordinarily incumbent upon them to look-out ahead, give proper signals and the like.

It appears that this train (No. 97, West bound) had originally been halted by the signal referred to on account of the fact that there were certain cars on the main track at Doswell, being collected there, to be brought back to Richmond that night by the train hereinbefore referred to as Extra 596 East. At this time there was a series or "cut" of cars coupled together, standing on the main track, some distance West of Doswell Station, just west of a road crossing there. The R. F. & P. crossing is some distance east of the station; a short distance east of the tower, where the telegraph operator was, and the train upon which the plaintiff was fireman was east of the crossing. These cars were standing on the main track without any lights protecting them. The engin of this train was standing on a side track preparatory to shifting some other cars into this cut of cars standing on the main track and which were to be taken to Richmond. Carnahan saw this engine and knew a train was at the station but states he didn't know any cars were standing on the main line.

He then states:

"Well, after seeing that we had the main line movement, and a clear block—that is, I mean no orders for us, and it indicated to us that we had the block (i. e. clear track) for 27 miles—I had nothing to do but begin firing the engine; in other words, I hooked the fire over and began to put in a little fire at a time—not but two or three shovelsful—in order to keep up the pressure and get away from there; it is upgrade and we had a very small engine, of the old type, and it caused constant firing; we had to keep putting in a little coal, one shovelful right after another very nearly, in order to keep up steam and not get stalled and stop to blow up steam. I did that

up to the moment the collision occurred, and had just got in a position to get up on the corner of the seat box to reach for the bell cord. I don't remember whether I ever got hold of the bell cord or not, but that was my intention, to reach far enough to get hold of the bell to give it a pull, and by that time we ran into those cars." (W. R. p. 20).

4 In the collision that followed the plaintiff was caught from his knee of his right leg, down, between the tank on the tender and the boiler head in the cab of his engine and remained pinned in that position for forty-five or fifty minutes, before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for this injury he brought suit.

The explanation of this catastrophe is as follows:

Upon the approach of train No. 97 at Doswell, the operator there, J. W. Beasley, who was in the tower and who controlled the signals and switches as well, being advised of the fact that there were cars standing on the main track gave the signal which halted the west bound train some distance east of the station. Conductor Shisler, who had charge of the making up of the train which was to leave Doswell for Richmond with the empty cars then being switched to form the train was apprised of the arrival of No. 97 at the signal where it was halted shortly after its arrival. The situation of his train there is explained in his evidence (W. R. p. 57), as follows:

"I had fifteen cars on the main line at that time: I think is was about fifteen or sixteen, I would not say just which, now, but about fifteen I think it was, standing on the main line:" that the caboose was on the west end of those cars, but there was nothing attached to the east end, the engine being at that time on a side track there. It further appears that there were no lights of any sort on the east end of the cars, that is facing the direction from which train No. 97 approached, and there were no flagmen placed there to protect the cars.

The operator of the tower was fully aware of the fact that the cars were on the main track. Conductor Shisler and Brakeman T. D. Blue, connected with the train crew of the train being made up at Doswell, then went into the tower, or telegraph office, to confer with the operator as to what arrangements were to be made to let train No. 97, which was waiting there, go by the station. What these arrangements were is the subject of a dispute between Conductor Shisler and Brakeman Blue on the one hand and Operator Beasley on the other. The two latter witnesses testify that Operator Beasley told them he would turn the train standing there (No. 97,

5 west-bound) through a side-track, that is around the cars standing on the main line, and thus allow it to proceed on its route; the operator (Beasley) being able through his levers, &c., to control the switching at that point.

Operator Beasley stated that he understood from the conversation that Conductor Shisler would arrange the switches, &c., to let train No. 97 pass, it appearing that the switches could be as well arranged

by some person on the ground as through the instrumentality of the levers in the tower. The gist of the matter seems to be that there was a misunderstanding as to who was to make the arrangements for train No. 97 to pass the cars standing on the track. The result was that operator Beasley gave train No. 97 a signal to proceed, relying upon Conductor Shisler to arrange for it to pass the cars, and Conductor Shisler and Brakeman Blue, thinking operator Beasley was going to do this took no precautions whatever to keep the train from running into the cars on the track the result being the collision referred to. The speed at which train No. 97 was running was ten or fifteen miles an hour.

After leaving the telegraph office or tower Brakeman Blue seems to have gone over on the side track where some cars were standing which were probably presently to be shifted by the engine of his train, then on the same track. He observed the approach of train No. 97 on the main line which had been given a signal to proceed by Operator Beasley and soon saw that a collision was imminent. He then endeavored by calling out and waiving his lantern, to avert the collision but no one on that train seems to have observed his signals. Had the engineman or the fireman who was injured, Carnahan, observed this warning it appears that they could have probably stopped the train in time to have avoided the accident.

While there was no light of any sort placed as a warning on the cars standing on the track, the engine of train No. 97 was equipped with an oil head light the character of which would have enabled the engineman or fireman to have seen the cars standing on the track in time to have stopped before reaching them.

It was the duty of the plaintiff as the fireman on train No. 97 to look ahead as far as practicable. He endeavored to explain his failure to observe these cars standing on the track by saying that he was shovelling coal and had not ceased very long before the collision occurred. It appeared that he passed a word with the fireman
6 of the engine standing on the side track there (J. L. Hartman) as he passed that engine, but just what he was doing then is not at all clear.

Just before the collision occurred he was reaching for the bell cord to ring for the crossing beyond which the cars were standing on the track. Even then had he observed the cars it is not improbable a collision could have been averted as the train could have been stopped within at least 50 feet, as the signal for the crossing was necessary to be given some distance from the crossing.

The declaration contain four counts. The first two counts charged that plaintiff and defendant were engaged in interstate commerce thus alleging a cause of action under the Employers' Liability Act of Congress. One of these was based upon the alleged negligence of Operator Beasley and the other upon the alleged negligence of the train crew of the train standing at Doswell under Conductor Shisler's charge. The other two counts were based upon the same grounds of negligence save that they omitted any allegations as to the parties being engaged in interstate commerce thus alleging a cause of action under the State laws.

There was a demurrer to the declaration based upon the ground that it was improper to combine in one suit a cause of action under the Employers' Liability Act of Congress and the State law. This demurrer the court overruled. It early appeared in the progress of the trial, by a stipulation, that the parties were engaged in interstate commerce at the time the plaintiff was injured (W. R. p. 16) so the court instructed the jury eventually, at the instance of the plaintiff, that they should disregard the third and fourth counts of the declaration, i. e. those based on a cause of action under the State law. (W. R. p. 100, Instruction I).

The case was tried before a regular jury and before the regular panel of nine veniremen had been sworn on their voir dire, and before any members of the panel had been stricken off, as allowed by law, the defendant challenged the array of jurors and moved to quash the venire upon the grounds that (1) the jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof and (2) the trial of the case before the jury as summoned, formed, selected and constituted deprived the defendant of rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of the United States
7 passed in pursuance thereof. This motion the court overruled and thereupon the defendant excepted. (W. R. pp. 12-14.)

After all the evidence in the case had been introduced the plaintiff asked for four instructions, numbered respectively I, II, III and IV, all of which the court gave. To the giving of the instructions numbered II and III the defendant excepted. (W. R. pp. 100 and 101). The defendant asked for four instructions marked, respectively, (*a*), (*b*), (*c*) and (*d*). Of these the court gave instructions (*a*) and (*b*) and declined to give instructions (*c*) and (*d*) to which action of the court the defendant excepted.

After the jury had returned their verdict for the plaintiff for $25,000 damages, the defendant moved the court to set aside the verdict of the jury and award it a new trial upon the grounds that (1) it was contrary to the law and evidence; (2) the jury was misdirected by the court, in its instructions (3) the damages were excessive and (4) the jury was not summoned, selected, formed and constituted in accordance with Act VII of the Amendments of the Constitution of the United States and the laws passed in pursuance thereof. This motion the court overruled and the defendant excepted. (W. R. p. 99.)

The defendant then moved in arrest of judgment on the ground that the court should have sustained the demurrer to the declaration for the reason that the defendant having been impleaded in an alleged cause of action arising under the federal law and another under the State law, at the same time, was deprived of rights, privileges and immunities arising from the statutes and Constitution of the United States and was a denial of due process of law. This motion the court overruled, to which action of the court the defendant excepted. (W. R. p. 11.)

Assignments of Error.

Your petitioner avers that in the course of the trial of the said action at law the learned Judge of the Circuit Court of Hanover County erred in the following particulars:

(1) In overruling the demurrer to the declaration and each count thereof;

8 (2) In overruling the challenge to the jury and motion to quash the venire;

(3) In giving instructions II and III asked for by the plaintiff or either of them;

(4) In refusing to give instructions (*c*) and (*d*) asked for by the defendant or either of them;

(5) In overruling the motion to set aside the verdict of the jury and award your petitioner a new trial;

(6) In overruling the motion in arrest of judgment.

I.

The Demurrer to the Declaration.

(*a*) The joinder of causes of action under the State law and the Employers' Liability Act of Congress is not permissible.

The peculiar nature of the Employers' Liability Act of Congress is pointed out in Michigan C. R. Co. v. Vreeland, 227 U. S. 66, 57 L. ed. 419.

It is there said that, prior to the passage of this act, the subject was one which fell within the police power of the statute but, says the court:

"By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employes injured while engaged in interstate commerce. This exertion of a power which is granted in express terms, must supersede all legislation over the same subject by the states."

See also,

Cound v. A. T. & S. F. Ry. Co., 173 Fed. 527, 531;
Mondou v. N. Y. &c. Ry. Co., 223, U. S. 1, 53;
So. Ry. Co. v. Jacobs, 9 Va. App. 28.

The act is the measure and the sole measure of liability of an employer to an employee, engaged in interstate commerce, and cannot be "pieced out" (227 U. S. 66) by a resort to state legislation.

9 The assertion of a right under the state law, therefore, necessarily excludes the idea of a right existing under the act of Congress, and vice versa.

Not only so but the rights given in the two instances are radically different, the principles applicable to a recovery are different, the defenses of the two actions are different and the recoveries in the

two actions are different, and the limitation of the right to sue is different.

This is apparent from a comparison of the act of Congress with the state laws on the same subject.

Can two such actions be joined in one declaration?

"The statement of distinct rights infringed by the same wrong constitutes a statement of distinct causes of action." 23 Cyc. 383.

In the case of Brunsden v. Humphrey, L. R. 14 Q. B. Div. 141; 53 L. J. Q. B. N. S. 476; 51 L. T. N. S. 529; 32 Week Rep. 94, a leading case, the Court held that injury to person and property caused by the same negligent act constitutes two causes of action.

Suits by or against a person in different capacities can never be joined.

Fitzhugh v. Fitzhugh, 11 Gratt. 302.
Epes v. Dudley, 5 Rand. 437.
Kayser v. Disher, 9 Leigh, 357.
Bishop v. Harrison, 2 Leigh, 532.

In McMullin v. Church, 82 Va. 505, it is said:

"But a person cannot, in the same action, join a demand in his own right; and a demand as representative of another or in autre droit; nor demands against a person on his own liability and on his liability in his representative capacity."

The capacity of a plaintiff to sue under the interstate commerce law is entirely different from his capacity to sue at common law. That is his rights are derived from two different and independent sources.

Nor is it permissible to join several different species of action in one declaration, although they may be all ex contractu or all ex delicto, 4 Minor, 447.

The species of action here are entirely different. One is a peculiar, exclusive statutory remedy, enforceable in the state tribunal, it is true, but so enforceable because it is the duty of
10 State courts to enforce federal as well as state laws and, by an act of Congress, special jurisdiction is conferred upon state courts in this class of cases. Mondou case, supra; The other is a common law remedy.

"The general doctrine" says Burks (Pl. & Pr. Sec. 92, 154) "Is that demands may be joined when they are *of the same nature*, and the same judgment is to be given in all, notwithstanding the *pleas may be different.*" (Author's italics.)

The demands in the case before us while they are in one sense of the same nature, in another sense they are entirely distinct and utterly disconnected. One demand is that arising out of an act of Congress creating a right and a liability where none existed before; the other is a demand arising out of a common law tort, reinforced by the state statute.

The same judgment cannot be given in both cases for the reason that a judgment on one count excludes the possibility of a judgment on the other—the causes of action being utterly inconsistent the one with the other.

A general verdict of the jury could not be permissible and could not be possible, inasmuch as there could not be a verdict on both counts, and the situation would be anomalous.

In 23 Cyc. p. 396, it is said that "a plaintiff cannot recover upon two or more inconsistent counts in his declaration."

And in 31 Cyc. p. 75, it is said "But if allegations are so utterly repugnant as to destroy one another, so that no cause of action or defense remains a general demurrer will lie against the pleading"; and further on: "The test of inconsistency is whether proof of one averment tends to disprove the other."

It is true that "the fact that inconsistent allegations as to the cause of the accident are made, it has been held, will not render a complaint for negligence defective" (31 Cyc. 76), but that is obviously an entirely different proposition—because the object of stating the case in different counts of a declaration is to meet the different phases of the proof. And this is as far as the Virginia Courts have gone.

See Seal v. V. P. Cement Co., 108 Va. 806.

In such a case whatever the facts may be ultimately de-
11 cided to be, the judgment of the court is the same and is to be measured by the same standard and the same legal principles are brought into play—which is decidedly not true in the case under consideration.

Upon a demurrer to a declaration for misjoinder the objection, if well founded, goes to the whole declaration.

Henderson v. Stringer, 6 Gratt., 130.

Malsby v. Lanark Co., 55 W. Va., 486; 47 S. E. 358; citing 4 Minor's Insts. p. 1161.

"When there is a misjoinder of counts a demurrer for this cause will be a general demurrer to the whole declaration not to a particular count, or a particular breach or to any other part of a count. This principle is in no wise inconsistent with that which requires a demurrer to a particular count, or a particular part of a count in order to make available an objection applicable to any one count or part of a count *then* to any other. The objection is that the plaintiff has joined causes of action which the law does not allow to be joined; and the objection, if sustained, necessarily shows that the whole declaration is bad."

1 Rob. (Old) Prac., 284. (Cited in Malsby v. Lanark Co., supra.)

See 4 Minor's Inst., 448.

Gary v. Abingdon Pub. Co., 94 Va. 779.

(*b*) The joinder of these causes of action is not permissible on another ground, which is more specifically set out in the motion in arrest of judgment, and that is that the uniting of the cause of action under the State law with a cause of action under the federal law is a denial of the due process of law guaranteed by the 5th Amendment to the Constitution of the United States.

It will be presently shown that cases under the federal employers' liability act presents federal questions and that the provisions of the 5th and 7th amendments to the Constitution apply to such cases even when proceeded in, in a State court. Assuming, at this time, that such is the case, the question presented is whether it is due process of law under federal jurisprudence, for a litigant to be hampered in the assertion of a federal right by being at the
12 same time impleaded under the state law and thus be required to defend two cases at the same time or else placed in such a position that in avoiding one he will fall into the other. It will be observed that the question, as we are now presenting it, is not complicated with any inquiry as to whether the 5th or 14th amendment applies here, it being now assumed that the 5th amendment applies to this particular proceeding; relying upon the discussion that is to follow in regard to the applicability of the 7th Amendment as a demonstration of that proposition; the two amendments being in pari materia on this question. It would seem, however, that there is no real distinction between the 5th and 14th amendments as to the meaning of "due process"—though the Supreme Court of the United States has declined to commit itself on that question. Slaughter-House Cases, 16 Wall. 36.

Due process of law in the fifth amendment refers to "that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law." In Re. Kemmler, 136 U. S. 448.

There must be a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. Pennoyer v. Neff, 95 U. S. 714.

This idea is well presented in the case of Williams Admr. v. Newman, 93 Va. 725: President Keith, speaking for the Court in that case said:

"To constitute due process of law it is necessary that the court should have jurisdiction, and that some recognized and accustomed mode of proceedure should be pursued, and these, as we have seen, are presented in this case.

The cause was before the proper court and is presented in a creditor's bill. But these requisites standing alone are not sufficient. The complaint must be presented by the proper party and against the proper party. *The plaintiff must set out his cause of action so that the defendant may avail himself of all just defences permitted him by the law of the land.*" (Italics ours.)

It will be observed that the contention is stronger as to the procedure in this case being a lack of due process, under the fifth amendment, than would be the case if this were a state pro-
13 ceeding in a state court, as to which the fourteenth amendment would apply, for the reason that while the federal courts, under the conformity act of Congress, adopt the practice of State courts, as far as they can, to federal proceedure, a defendant cannot

be proceeded against in the federal courts for violation of state laws along with federal laws at the same time. Thus if this proceedure is permissible in a state court there is a denial of the equal protection of the laws which is one of the essentials of "due process."

It is believed that the opportunity of an intelligent defence is denied where a defendant is proceeded against in the same action for alleged violations of the laws of two different sovereignties and that so far from it being in accordance with the settled rules of common law proceedure it is an unheard of thing under that system of jurisprudence.

II.

The Challenge to the Array of Jurors and Motion to Quash the Venire.

As before stated the jury in this case was a regular jury, summoned under the State law, and consisted of nine veniremen which, after the plaintiff and defendant had each stricken off one veniremen, left a jury of seven men who tried the case. The motion referred to was made before the jury had been examined on their voir dire and before any members of the panel had been stricken off by either party.

The grounds of this motion were set out at the time the motion was made, the point being that the jury was not summoned, selected, formed and constituted as required by the Constitution of the United States.

Article VII of the Amendments to the Constitution of the United States provides:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The jury referred to in this amendment is the common law jury of twelve men. Capital Traction Co. v. Hof, 170 U. S. 343; Maxwell v. Dow, 176 U. S. 581.

14 And the phrase "suits at common law," found in this Article, means "not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those in which equitable rights alone were recognized and equitable remedies were administered; or which, as in admiralty a mixture of public law and of maritime law and equity was often found in the same suit."

Parsons v. Bedford, 3 Peters, 433, 434.

The question early arose as to whether the fifth and seventh amendments to the federal constitution among others, applied to proceedings in state courts where state and not federal rights were involved and it was held that they did not.

Referring to the fifth amendment Chief Justice Marshall said, in Barron v. Balto. 7 Peters, 251:

"We are of opinion that the provision in the fifth amendment to the Constitution declaring that private property shall not be taken without just compensation is intended solely as a limitation on the exercise of power by the government of the United States and is not applicable to legislation by the states."

See also Walker v. Savinet, 92 U. S. 90.

After the adoption of the fourteenth amendment to the Constitution it was contended that this amendment extended the protection of the fifth and seventh amendments to state proceedings where state rights alone were concerned.

This contention was denied in the Slaughter House cases, 16 Wall. 36, 74, 78.

See also Brown v. New Jersey, 175 U. S. 172.

Maxwell v. Dow, 176 U. S. 581.

It will be observed that the question decided in these cases is that the seventh amendment does not apply to proceedings in State courts where state rights are alone involved.

The question presented in this case is whether the provisions of the seventh amendment to the federal constitution, in relation
15 to trial by jury, extend to proceedings in state courts where federal rights are involved.

This question is of unusual interest and far-reaching importance. It appears never to have been passed upon by the Supreme Court of the United States, though that court has decided an analagous question in favor of the federal right as will be presently shown.

It appears to be one of the few missing links in the chain of constitutional construction forged about that instrument by the master minds of Marshall and Story and the other great expounders of the Constitution.

The contention we now make is, first the seventh amendment operates on the federal right and not alone on the federal tribunal and, second, the state court, quoad this action, is a quasi federal tribunal.

(*a*) That the seventh amendment operates on the federal right rather than the federal tribunal is we think obvious from the history of the amendment.

Said Mr. Justice Story in Parsons v. Bedford, 3 Peters, 446:

"One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

The lack of this provision in the original federal constitution was ably defended by Hamilton and others in the Federalist but their

defense, though plausible, was unsatisfactory to the people at large. (See the Federalist, No. 81 and No. 83; Story's Const. Sec. 1768, et seq.)

It is to be observed that at the time of the adoption of the Constitution there were no inferior federal tribunals. The sole federal court created by that instrument was the Supreme Court of the United States invested with original jurisdiction in only a limited class of cases and with appellate jurisdiction in all other cases involving federal rights and raising federal questions. The establishment of other federal tribunals was left wholly with Congress. It seems clear therefore that if the amendment was to operate at all it must operate in whatever tribunals the federal questions might arise.

It will be observed that the seventh amendment has two branches, one securing the right of trial by jury and the other providing that no fact tried by jury shall be re-examined in any court of the United States otherwise than according to the rules of the common law. The object of both the provisions, is the same that is to preserve the right of trial by jury, i. e. to secure the right to the litigant in the first instance and to prevent the appellate courts from interfering with that right in an appellate proceeding.

Parsons v. Bedford, 3 Peters, 446, 449.
Slocum v. N. Y. Life Ins. Co., 228 U. S. 879.

In the case of C. B. & Q. R. R. Co. v. Chicago, 166 U. S., 242, the court had occasion to consider whether the last clause of the seventh amendment applied to an appeal from a state court to a federal court and the court held that it did, and observed:

"It is clear that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest cou-t, of the state. One objection made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it, facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law. The seventh amendment was intended to meet these objections and to deprive the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the courts of the Union and leave it open for those courts to re-examine, in disregard of the rules of the common law, facts tried by juries empanelled in the State courts in cases which, by reason of the questions involved of them, could be brought under the cognizance of the courts of the United States."

The Justices v. Murray, 9 Wall. 274.
Capital Traction Co. v. Hoff, 174 U. S. 1.
Cooley's Principles of Const. Law, p. 266.

Why should the federal appellate court be at pains to preserve the right of trial by jury in the original court if that right may be denied the litigant when he gets there?

(*b*) That the seventh amendment is a limitation upon the power of Congress to authorize any court to try a common law suit involving more than twenty dollars, without a jury, or with a jury of less than twelve men, will not and cannot be denied.

The jurisdiction of the State courts in suits under the Employers' Liability Act of Congress is under certain acts of Congress. See Judicial Code, sec. 28: Employers' Liability Act, Amendment of 1910.

Furthermore when they are brought in the State court the defendant is denied the right of removal to the federal court.

Mr. Hamilton in the Federalist (No. 81) was of opinion that for Congress to invest state courts with jurisdiction of federal questions peculiar to the Constitution would be to constitute them federal tribunals for that purpose.

That there were certain causes, jurisdiction of which without any act of Congress, could be exercised concurrently by the state and federal courts is benerally admitted. Cohens v. Virginia, 6 Wheat. 397; Story's Const. Sec. 1754; The Federalist No. 82.

But as to cases peculiar to the Constitution, such as those arising under the laws of the United States (the case before us) there seems to have been considerable doubt whether the state courts, without Congressional action, had any such jurisdiction. Story's Const. Sec. 1754 and cases cited in note 5. Indeed Mr. Justice Story was of opinion that Congress could not confer jurisdiction in that class of cases upon the State Courts. Martin v. Hunter, 1 Wheat. R. 330. In this however he was not followed. The Justices v. Murray, 9 Wall. 274; Mondou case, 223 U. S. 1, 58.

The whole question came before the Supreme Court of the United States in the case of Claflin v. Houseman, 93 U. S. 130, and it was there held that "rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in State Courts, competent to decide rights of like character and class; subject, however, to this qualification, that
18 where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Court exclusive jurisdiction." See also the Mondou case, supra.

It is perhaps true, under these latter decisions, that independently of any action by Congress the State Courts would have jurisdiction over this class of cases. But Congress has acted and acted in so vigorous a fashion, that when these suits are brought in the State Courts, the defendant is deprived of a right of removal to the federal courts. Judicial Code, Sec. 28; Lee v. Toledo, &c., R. Co. 193 Fed. 685.

The State courts then, in these cases, when they are originally prosecuted in those forums are courts invested by Congress with original jurisdiction of suits arising under the laws of the United States, and therefore for this purpose they are quasi federal courts—

courts exercising, by virtue of congressional enactments, authority over rights and remedies created by federal law.

And having been invested with such authority by Congress there necessarily attaches all the limitations upon this authority imposed by the federal constitution, including of course the provisions of the seventh amendment.

As before stated this question does not seem to have been directly passed upon by the Supreme Court of the United States.

The question was raised in the case of M. K. & T. R. Co., v. West, Advance Opinions U. S. Sup. Ct., May 1, 1914, a case coming from a State court, as to whether a verdict of three-fourths of the jury, permissible under the State law, was sufficient in a suit brought under the Employers' Liability Act. The court held, however, that the act did not apply, but observed "as the action was brought under the state law, and not under the federal law, it becomes unnecessary to notice errors assigned by the railway Company, including that based on the instruction of the trial court that a verdict could be rendered by three-fourths of the jury."

III.

The Instructions.

Instruction III given for the plaintiff is as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the
19 plaintiff in this action, then, in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future not however in excess of $35,000.00 as to them may seem just and fair."

This instruction is erroneous in two particulars: First, it allowed the jury, in estimating the damages to the plaintiff, to take into consideration "its effect upon his future."

This language was entirely too broad and allowed the jury to take into consideration things which might be in their nature essentially speculative and remote and for which there could be no recovery in damages.

There are many "effects upon his future," resulting from the injury, which the jury should not have been allowed to consider.

It is not at all the damages or "effects" flowing from an injury for which a defendant can be held liable, but only such damages as are the "legitimate sequence of the thing amiss" and such as could have been foreseen in the light of the circumstances existing at the time.

Allison v. Fredericksburg, 112 Va., 243.
Fowkes v. So. Ry. Co., 96 Va. 742.

The instruction allowed the jury to go far beyond that.

Under it the jury might have considered the possibility of the

plaintiff's promotion and speculative profits from collateral undertakings upon which he might have embarked but for the injury both of which have been condemned as improper elements of damage in such cases.

R. & D. R. Co. v. Elliott, 149 U. S. 267.
Boston, &c. Co. v. O'Reilly, 158 U. S. 334.

All of these things are "effects upon the future."

Again the jury under that instruction, might have taken into consideration possible future physical effects from the injury such as future suffering which, in the absence of any evidence as to the probability of such future suffering, was improper.

Norfolk &c. R. Co. v. Spratley, 103 Va. 388.
Block v. Milwaukee, &c. R. Co., 89 Wis. 371, 27 L. R. A., —.
Shultz v. Griffin, 103 Iowa, 150, 40 L. R. A., 117.
1 Joyce on Damages, Sec. 246.

Second. The instruction directs the attention of the jury to the sum of $35,000 the amount claimed, without qualifying it with the statement that the sum was mentioned merely because it was the maximum amount claimed in the declaration.

It sees that if the jury may have been misled by such a statement in an instruction, it is reversible error.

Newport News P. Co. v. Beaumeister, 104 Va. 748.

Instructions (*c*) and (*d*) asked for by the defendant and refused, told the jury that in estimating damages to the plaintiff they could not take into consideration the chance of his increased earnings by reason of promotion or the prospects of any increased earnings to be made by him. We have shown that these elements of damage were improper. It is true the Court, during the argument, orally instructed the jury to disregard these elements of damage; but the court erred in not giving them the written instructions asked for by the defendant so that the jury might have taken the instructions to their room, along with the instructions for the plaintiff, one of which was broad enough to permit the jury to consider those very elements of damage.

IV.

The Motion for a New Trial.

The only one of the grounds of this motion which has not already been considered is the ground of excessive damages. Of course, it is difficult, if not impossible, for the courts to fix any limit to which the juries should be allowed to go in any particular case or class of cases and yet there must be some control of this matter taken by the courts, or else by successive gradations in the size of the verdicts of juries in these cases there will be gradually brought about a practical confiscation of property of railroad companies.

Of course, the injuries in this case were very severe and the

circumstances connected with the accident were distressing,
21 but, by comparison at least, the amount allowed the jury was grossly excessive. In a very recent case in this court (Belmont v. McAllister, 9 Va. App. —) the court took control of this subject and reduced the amount allowed an attorney for services performed by him, on the ground that it was grossly excessive.

Much was said and will be said as to the pain suffered by the plaintiff and that there are no human scales by which it can be measured, all of which is true. But that merely emphasizes the necessity of not allowing the jury free sway, as under that theory, no amount whatever would be excessive.

The question arising on the motion in arrest of judgment has already been considered.

Your petitioner therefore prays for a writ of error and supersedeas to the judgment complained of and that the same may be reviewed and reversed.

Respectfully submitted,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By Counsel, D. H. & WALTER LEAKE, *f. p.*

The undersigned, counsel practicing in the Supreme Court of Appeals of Virginia is respectfully of opinion that there is error in the accompanying record and that the judgment complained of should be reviewed and reversed.

May 26th, 1914.

D. H. LEAKE.

Received May 28, '14.

JAMES KEITH.

Writ of error and supersedeas awarded. Bond $30,000.00.

JAMES KEITH.

Rec'd May 29/14.

H. S. J.

22 VIRGINIA:

Pleas Before the Circuit Court of Hanover on the 25th Day of March, 1914.

Be it remembered that heretofore, to-wit: At rules held in the Clerk's Office of the said Circuit Court, on Monday the 5th day of January, 1914, came A. P. Carnahan, by his attorneys and filed his declaration against the Chesapeake & Ohio Railway Company, of a plea of Trespass on the Case, which declaration is in the words and figures following, to-wit:

Declaration.

First January Rules, 1914.

A. P. Carnahan complains of the Chesapeake & Ohio Railway Company, a corporation, of a plea of trespass on the case for this, to-wit:

First Count. That heretofore, to-wit, at the time of the commission of the grievances hereinafter complained of, the said defendant was a common carrier by railroad and owned and operated a certain line of railway, with tracks, side tracks, and switches, running from Cincinnati, Ohio, through the state of Ohio, and from Louisville, Ky., through the state of Kentucky, and through the state of West Virginia and through the state of Virginia to Newport News, and through the County of Hanover, in Virginia, and the said defendant was then and there as such common carrier by railroad engaged in commerce between the states aforesaid; and the said defendant in and about its said business used on said railway steam locomotives and cars for the transportation and hauling of freight and passengers.

And the said plaintiff says that before and at the time of the commission of the grievances hereinafter set out, to-wit: on the 7th day of March, 1913, he was in the employment of the said defendant as a fireman upon a certain engine then and there hauling a certain train of the said defendant known as No. 97; which the said defendant was then and there using in its said business in the transportation of certain cars used and then and there being used by it in such commerce, from the state of Virginia to the state of West Virginia, and the other states aforesaid. That the said train was then in the County of Hanover, and its destination was westward over said railway, as aforesaid. The said plaintiff says that while the said defendant was then and there as such common carrier by railroad engaged in such commerce between the states aforesaid, the said plaintiff was employed by the defendant in such commerce.

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And the said plaintiff says that the said defendant then and there as such carrier had in its services engaged about the work aforesaid, certain other servants, agents, and employees, to-wit: conductors, engineers, firemen, switchmen, flagmen, brakemen, and persons in charge of switches and signal points, and in said County of Hanover, at Doswell, had located a certain signal tower or signal point from which signals to govern movement of trains over the defendant's said railway were given, and switches in that vicinity adjusted, which signal tower and signals and switches were in charge of a certain employee and agent of the said defendant.

And the said plaintiff says that on the 7th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M. and while the night was very dark *and* the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to a signal from said signal

tower, stopped. Thereupon, it became and was the duty of the said defendant and of the employee and agent of said defendant in charge of said signal tower not to permit the said train on which the said plaintiff was employed, as aforesaid, to proceed upon its journey westward while it had notice that the tract ahead was obstructed.

And the said plaintiff says that on the day and year aforesaid, at the time aforesaid, there were on the main tract of said railway, a short distance West of said signal point, certain other cars under the control of the said defendant, of which fact the said defendant and the said employee and agent of said defendant in charge of said signal tower, or signal point, had notice. But the presence of said cars on said tract was unknown to said plaintiff or to any employee on said train on which the plaintiff was working, and the plaintiff and said last names employees had no notice of the presence of said cars on said track.

Yet, the said defendant did not regard its duty in this behalf, but on the contrary, so carelessly and negligently conducted itself through its said employee and agent in charge of said signal tower, or signal point, that the said signal was then and there given requiring the said train on which the plaintiff was working, to proceed Westward and the switches adjusted so that it should proceed on said main track without warning or notice that said track was blocked and obstructed by said cars; but, on the contrary, by said signal notified the said plaintiff that said track was cleared and free of obstruction and caused said train to proceed Westward, and thereupon and by reason of the said negligent acts of the said defendant, said locomotive on which the plaintiff was riding, engaged in his work on said engine as his duty required, was driven upon and against the said cars on said tract, on which the said train was then and there proceeding, and by said collision one of the said plaintiff's legs was so mangled and burned that it had to be amptuated, and the plaintiff was otherwise greatly injured.

Second Count. And for this also, to-wit: That heretofore, to-wit, at the time of the commission of the grievances hereinafter complained of, the said defendant was a common carrier by railroad and owned and operated a certain line of railway, with tracks, side tracks, and switches, running from Cincinnati, Ohio, through the state of Ohio, and from Louisville, Ky., through the state of Kentucky, and through the state of West Virginia, and through the state of Virginia to Newport News, and through the County of Hanover in Virginia, and the said defendant was then and there as such common carrier by railway engaged in commerce between the states aforesaid; and the said defendant in *the* about its said business used on its said railway steam locomotives and cars for the transportation and hauling of freight and passengers.

And the said plaintiff*s* says that before and at the time of the commission of the grievances hereinafter set out to-wit, on the 7th day of March, 1913, he was in the employment of the said defendant as fireman upon a certain engine then and there hauling a certain train of the said defendant, known as "No. 97," which the said defendant was then and there using in its said

business, in the transportation of certain cars used and then and there being used by it in such commerce, from the state of Virginia to the state of West Virginia, and the other states aforesaid. That the said train was then in the county of Hanover, and its destination was Westward over said railway, as aforesaid. The said plaintiff says that while the said defendant was then and there as such common carrier by railroad engaged in such commerce between the states aforesaid, the said plaintiff was employed by said defendant in such commerce.

And the said plaintiff says that the said defendant then and there as such carrier had in its service engaged about the work aforesaid, certain other servants, agents, and employees, to-wit, conductors, engineers, firemen, switchmen, flagmen, brakemen, and persons in charge of switches and signal points, and in said county of Hanover, at Doswell, had located a certain signal tower or signal point from which signals to govern movement of trains over the defendant's said railway were given, which signal tower was in charge of a certain employee and agent of the said defendant.

And the said plaintiff says that heretofore, to-wit, on the 17th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M. and while the night was very dark, the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to a signal from said signal tower, stopped. The said plaintiff says that on the day and year aforesaid, and at the time aforesaid, there was on said main track, a short distance Westward from Doswell, certain other cars under the control of said defendant, part of another train of the said defendant, of the presence of which last named cars on said track, the said plaintiff and the employees in charge of the train on which the said plaintiff was working, neither knew or had notice; of the presence of which cars so obstructing said track the said employee and agent of said defendant in charge of said signal tower had notice.

Thereupon, it became and was the duty of the said defendant to use reasonable care to warn the employees in charge of said train on which said plaintiff was working, of obstructions on said track, and it was then and there the duty of the employees of said defendant who had charge of said other cars obstructing said track as
26 aforesaid not to permit said cars to remain on said main track without light thereon and warnings to other trains that might be proceeding on said main track, and especially to the train on which the plaintiff was working, as aforesaid.

Nevertheless, the said defendant and the said employees on said train then and there permitted said cars to remain on said track without warning or signal or other notice to the plaintiff, or to the employees in charge of the train on which the plaintiff was working; that said track was so obstructed, and the said train on which the plaintiff was working, was then and there directed to proceed along said main track to the Westward, and thereupon, by reason of the negligent acts of the said defendant and the said employees on said other train, the said plaintiff and the employees in charge of the train on which he was

working, as aforesad, being ignorant that said tract was so obstructed, collided with said cars so obstructing the track, as aforesaid, and said locomotive on which the plaintiff was riding, engaged in his work thereon, as his duty required, was driven upon and against said train of said track, and by said collision, one of said plaintiff's legs was so mangled and burned that it had to be amputated and the plaintiff was otherwise greatly injured.

Third Count. And for this also, to-wit: That heretofore, to-wit, on the 7th day of March, 1913, the said defendant was a railroad company and owned and operated a certain line of railroad with tracks, side tracks, and switches running through the state of Virginia, from Richmond, Va., to Charlottesville, Va., and through the County of Hanover, and the defendant used thereon steam locomotives and cars for the transportation and hauling of freight and passengers, and the defendant then and there, in and about the operation of its business aforesaid, employed certain conductors, flagmen, brakemen, switchmen, and persons who had charge of switches and persons who had charge of signal points, and persons who had charge of locomotive engines.

And the said plaintiff says that heretofore, to-wit, before and at the time of the commission of the grievances hereinafter set out, being heretofore, to-wit, the day and year above mentioned, he was in the employment of the said defendant as a fireman upon a certain locomotive attached to a certain train of the said defendant,
27 known as "No. 97," which was then and there proceeding from Richmond, Va., to Charlottesville, Va., and was then and there in Hanover County, in Virginia, at Doswell. And the said plaintiff says that at Doswell said defendant had located a certain signal tower and signal point from which signals to govern movement of trains over the defendant's said railway were given, and switches in that vicinity adjusted, which signal tower and signals and switches were in charge of a certain employee of the said defendant.

And the said plaintiff says that on the 7th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M., and while the night was very dark and the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to a signal from said signal — duty of the said defendant and of the employee and agent of said defendant in charge of said signal tower not to permit the said train on which the said plaintiff was employed, as aforesaid, to proceed upon its journey westward while it had notice that the track ahead was obstructed.

And the said plaintiff says that on the day and year aforesaid, at the time aforesaid, there were on the main tract of said railway, a short distance West of said signal point, certain other cars under the control of the said defendant, of which fact the said defendant and the said employee of said defendant in charge of said signal tower, or signal point had notice. But the presence of said cars on said track was unknown to said plaintiff or to any employee on said train, on which the plaintiff was working, and the plaintiff and said

last named employees had no notice of the presence of said cars on said track.

Yet, the said defendant did not regard its duty in this behalf but, on the contrary, so carelessly and negligently conducted itself through its said employee and agent in charge of said signal tower, that the signal was then and there given requiring the said train on which the plaintiff was working, to proceed westward, and the switches adjusted so that it should proceed on said main tract without warning or notice that said track was blocked and obstructed by said cars; but, on the contrary, by said signal notified the said plaintiff that said track was cleared and free of obstructions, and caused said train to proceed Westward, and thereupon and by reason of the said negligent acts of the said defendant, said locomotive on which said plaintiff was riding, engaged in his work on
28 said engine, as his duty required, was driven up and against said cars on said track, on which the said train was then and there proceeding, and by said collision one of the plaintiff's legs was so mangled and burned that it had to be amputated, and the plaintiff was otherwise greatly injured.

Fourth Count. And for this also, to-wit: That heretofore, to-wit, on the 7th day of March, 1913, the said defendant was a railroad company and owned and operated a certain line of railroad with tracks, side tracks and switches running through the state of Virginia, from Richmond, Va. to Charlottesville, Va., and through the County of Hanover, and the defendant used thereon steam locomotives and cars for the transportation and hauling of freight and passengers, and the defendant then and there, in and about the operation of its business, aforesaid, employed certain conductors, flagmen, brakemen, switchmen, and persons who had charge of switches and persons who had charge of signal points, and persons who had charge of locomotive engines.

And the said plaintiff says that heretofore, to-wit: before and at the time of the commission of the grievances hereinafter set out, being heretofore, to-wit, the day and year above mentioned, he was in the employment of the said defendant as a fireman upon a certain locomotive attached to a certain train of the said defendant, known as "No. 97," which was then and there proceeding from Richmond, Va., to Charlottesville, Va., and was then and there in Hanover County, in Virginia, at Doswell. And the said plaintiff says that at Doswell said defendant had located a certain signal tower and signal point from which signals to govern movement of trains over the defendant's said railway were given, which signal tower was in charge of a certain employee and agent of the said defendant.

And the said plaintiff says that heretofore, to-wit, on the 7th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M. and while the night was very dark, the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to the signal from said signal tower, stopped. The said plaintiff says that on the day and year aforesaid, and at the time aforesaid, there

were on said main track, a short distance Westward from
29 Doswell, certain other cars under the control of said defendant, part of another train of the said defendant, of the presence of which last named cars on said track, the said plaintiff and the employees in charge of the train on which the said plaintiff was working, neither knew or had notice; of the presence of which cars so obstructing said track the said employee and agent of said defendant in charge of said signal tower had notice.

Thereupon, it became and was the duty of the said defendant to use reasonable care to warn the employees in charge of said train on which said plaintiff was working, of obstructions, on said track, and it was then and there the duty of the said employees of said defendant who had charge of said other cars obstructing said track, as aforesaid, not to permit said cars to remain on said main track without light thereon and warning to other trains that might be proceeding on said track, and especially to the train on which the plaintiff was working, as aforesaid.

Nevertheless, the said defendant and the said employees on said train then and there permitted said cars to remain on said track without warning or signal or other notice to the plaintiff, or to the employees in charge of the train on which the plaintiff was working that said track was so obstructed, and the said train on which the plaintiff was working was then and there directed to proceed along said main track to the Westward, and thereupon, by reason of the negligent acts of the said defendant, and the said employees on said other train, the said plaintiff and the employees in charge of the train on which he was working, as aforesaid, being ignorant that said track was so obstructed, collided with said cars so obstructing the track, as aforesaid, and said locomotive on which the plaintiff was riding, engaged in his work thereon, as his duty required, was driven upon and against said train on said track, and by said collision, one of said plaintiff's legs was so mangled and burned that it had to be amputated and the plaintiff was greatly injured.

To the damage of the said plaintiff of Thirty-five Thousand ($35,000.00) Dollars. And therefore he institutes this action of trespass on the case.

ALLEN & WALSH, *P. Q.*

Whereupon the defendant being summoned and not appearing,
30 on motion of the plaintiff by his attorneys, it was ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff had sustained unless the defendant should appear and plead to issue at the then next rules.

At which day, to-wit: At rules held in the Clerk's Office of the said Circuit Court of Hanover County, on Monday the 12th day of January, 1914.

The defendant still failing to appear, on motion of the plaintiff by his attorneys, it was ordered that the last order made against it in this cause be confirmed and that the plaintiff's damages be ascertained by a jury at the next term.

And at another day, to-wit: At a Circuit Court for Hanover County, held at the Court House in said County on the 24th day of March, 1914.

This day came the parties by their attorneys and the defendant filed a demurrer to the declaration which being argued by counsel the court overruled, to which the defendant excepted, and the defendant entered the plea of "not guilty," and puts itself upon the Country and the plaintiff doth the like. Thereupon came the jury drawn, summoned and in attendance upon the Court in the manner prescribed by law and the defendant challenged the array of jurors and moved to quash the venire upon grounds set out in a writing filed in the record which is in the words and figures following, to-wit: 1. The Jury in this case is not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof. 2. The trial of this case before the Jury as summoned, formed, selected and constituted deprives the defendant of the rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of the United States passed in pursuance thereof. (Marked A.) Which motion being overruled by the Court the defendant excepted thereto, and the Jury, to-wit: H. J. Cross, T. E. Stanley, Henry Heath, W. M. Wingfield, R. A. Harris, J. S. Priddy, and B. C. Blunt, being elected, tried and sworn the truth of and upon the premises to speak, and having fully heard the evidence and the usual hour of adjournment having arrived were adjourned over until tomorrow morning at 10 o'clock.

And on another day, to-wit: Wednesday, March 25th, 1914.

This day came again the parties and the jury adjourned
31 over on yesterday appeared into Court pursuant of their adjournment and having been instructed in writing by the Court and fully heard the argument by Counsel, retired to their room and after some time returned into Court and returned the following verdict, to-wit: "We, the Jury find for the plaintiff and fix the damages at $25,000.00 (signed) J. S. Priddy, foreman;" and the Jury being discharged the defendant moved the Court to set aside the verdict as contrary to the law and evidence and grant a new trial for the following reasons, to-wit: First. Contrary to law and evidence. Second. Misdirection of the Court to the Jury. Third. The damages are excessive. Fourth. The Jury was not summoned, selected, formed and constituted in accordance with Article VII, of the amendments of the Constitution of the United States and the laws passed in pursuance thereof. Which motion the Court overruled to which ruling of the Court the defendant excepted. Thereupon the defendant moved in *the* arrest of judgment for the following reasons, to-wit: "The defendant moved in arrest of judgment in that the demurrer to the declaration should have been sustained on the ground that:—*That* it is a right, provilege and immunity of the defendant, a corporation engaged in interstate commerce arising under the Constitution and Statutes of the United States, when impleaded by a plaintiff alleging himself to be engaged in interstate commerce at the time of his injury and suing to recover

damages for such alleged injury under the act of Congress of April 22nd, 1908, as amended to have said action heard and determined without being hampered and restricted by being at the same time jointly sued by means of other counts in the same declaration for alleged causes of action arising under the laws of the State of Virginia; That said alleged causes of action are inconsistent and repugnant and the trial of the same necessarily resulted in confusion and uncertainty and the defendant was thereby deprived of his rights, privileges, and immunities, arising from the statutes and constitution of the United States aforesaid and was denied due process of law." Which motion is overruled, to which the defendant excepted.

Thereupon it is the judgment of the Court that the plaintiff A. P. Carnahan, recover of the defendant The Chesapeake & Ohio Railway Company the sum of Twenty-five Thousand Dollars the amount by the Jury in their verdict ascertained and his cost by him
32 about his suit in this behalf expended.

And the defendant having indicated its intention to apply for a Writ of Error and supersedeas in this case execution is suspended for sixty days.

MEMO.—During the progress of the trial the defendant excepted to sundry rulings and decisions of the Court and by consent of parties in open court and now entered of record the defendant is given sixty days within which to prepare and present to the Court its several bills of exception which when received will be signed, sealed and made a part of the record.

Bill of Exceptions No. 1.

Be it remembered that on the trial of this cause and after the jury, which was a regular jury summoned for the term of Court during which this case was tried, under a venire facias, which it was admitted by the defendant, was issued and returned in conformity with the statutes of Virginia and which is in the following words and figures, to-wit:

The Commonwealth of Virginia to the Sheriff of Hanover, Greeting:

We command you, that you summon and cause to come before the Circuit Court for the County of Hanover, on the 18th day of March, 1914 (that being the third day of March term of said Court), nine persons:

1. Nelson Hughes,
2. H. J. Cross,
3. T. E. Stanley,
4. Henry Heath,
5. W. M. Wingfield,
6. O. B. Green,
7. R. A. Harris,
8. J. S. Priddy,
9. B. C. Blunt.

they being drawn jurors for the said Court for the said County to serve as jurors during the term aforesaid. And have then there this writ and the names of the jurors.

Witness, C. W. Taylor, Clerk of our said Court, at the
33 court-house the 3rd day of March, 1914, and in the 138 year of the Commonwealth.

C. W. TAYLOR, *Clerk*

Drawn in our presence, this 2d day of March, 1914.

GEO. P. HAW,
Commonwealth's Attorney.
J. C. STEVENS,
Commissioner in Chancery.

And before the jury had been examined on their voir dire and before they had been sworn to try the issue joined and before the plaintiff and defendant had exercised their respective rights under the Statute of Virginia of each striking off one member of the jury from the panel, the defendant by counsel, submitted in writing the following motion to the Court, upon the grounds stated therein, as follows:

Challenge to the Jury and Motion to Quash the Venire.

And now comes the said defendant and challenges the array of jurors, in this case and moves the court to quash the venire on the following grounds:

1. The jury in this case is not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof.

2. The trial of this case before the jury as summoned, formed, selected and constituted, deprived the defendant of the rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of United States, passed in pursuance thereof.

The Court thereupon overruled said challenge and motion, to which ruling of the Court the defendant, by counsel, excepted, and tenders this its bill of exceptions No. 1 and prays that it may be signed, sealed, and made a part of the record in this cause
34 and the same is done accordingly on this 16th day of April, 1914, and within the time prescribed by law.

R. H. L. CHICHESTER. [SEAL.]

Bill of Exceptions No. 2.

Be it remembered that, on the trial of this cause, and after the jury had been selected and sworn to try the issue joined, the plaintiff and the defendant, respectively, introduced to the jury the following evidence:

NOTE.—Before the opening statements were made all witnesses were excluded from the court room, upon motion of counsel for the defendant.

After the opening statements by Mr. Allen, on behalf of the plaintiff and by Mr. Carter on behalf of the defendant, the plaintiff, to sustain the issue on his part, introduced the following evidence:

Stipulation.

It is agreed by the Chesapeake & Ohio Railway Company that the following statement taken from the records, shall be used as evidence in the same manner as if the defendant had been required to produce it under Section 3371 of the Code of Virginia:

Train No. 97, Engine 199, in charge of Engineman E. L. Bailey and Conductor William McGraw, left Richmond at 12:40 A. M. March 7th, 1913, with seven tourist sleepers Nos.

2542	1169
1129	1171
1060	1082
1085	

The first six of these sleepers had been used in handling troops from Fort Monroe to Washington and return, account Inauguration. Sleeper 1085 left Cincinnati, O. March 4th, 1913, with recruits for Norfolk. All of these cars at time of accident were being moved dead-head to Cincinnati, on request of the Pullman Company, with the exception of car 1082 which was to be
35 delivered to the Kanawha & Michigan Ry. at Charleston, W. Va. There were no passengers occupying these cars.

Extra Freight 596 West, in charge of Engineman M. E. Lane and Conductor J. R. Shisler, had moved from Richmond to Doswell with several loaded cars for delivery to the R. F. & P., with instructions to pick up all empty coal cars at Doswell for the C. & O., and bring them to Richmond. They had arrived at Doswell, terminated their run with the loaded cars, and it was while engaged in shifting out these empty coal cars that this thing happened. The train handled no freight from Doswell to Richmond, running as Extra 596 East, as the empty coal cars were being brought from Doswell to Richmond to be put in line for the West Virginia coal fields. This particular train, Extra 596, terminated its run with the cars at Richmond.

ASA P. CARNAHAN, the plaintiff, being duly sworn, testified as follows:

By Mr. Allen:

Q. Mr. Carnahan, please state to the jury your given name?
A. Asa P. Carnahan.
Q. You, I believe, are the plaintiff in this suit which we are trying now?
A. Yes, sir.
Q. What was your age on the 7th day of March, 1913?
A. I was thirty-two years, three months and some days.

Q. What was the condition of your health prior to that time, and up to that time—your physical condition?

A. Well, my health was good; I had the best kind of health, and could stand the hardest kind of work in the way of firing an engine. I could do as much as any man; I was may be above the average man—average fireman, rather.

Q. In whose employ had you been prior to, and up to that date?

A. I do not understand you. Who was I running with, do you mean?

A. No, who was your employer?

A. Oh, the C. & O. I was employed as fireman.

Q. How long had you been fireman for the C. & O.?

A. About six and a half years.

36 Q. What class of firing did you do? Was it with the passenger service or freight service?

A. I did both.

Q. Just state to the jury now where you were, and what were you doing, about twelve o'clock on the night of the 6th of March, 1913, and thereafter?

A. Well, on the night of March 6th, 1913, I was called to fire Engine 199, on No. 97, to leave Main Street Station about 12 o'clock.

Q. Where? At Richmond?

A. Richmond, Virginia; with a dead-head equipment of tourists cars, from Charlottesville. As well as I recollect we left Richmond about 12:30, and we arrived at Doswell about 2 o'clock. We stopped, on the red signal, I should say six or seven minutes; by the time we got the white signal, the engineer used the proper signal to call the flag in, and the flagman came in and the proper signal was answered, and we proceeded, with a clear signal. There was no signal for orders. Under those conditions, that is, the signals we got, we are supposed to have the main-line movement and the right of track for about twenty-seven miles.

Q. To what point?

A. Pendleton, Virginia.

By Mr. Haw:

Q. You say the proper signal was given to call in the brakeman?

A. Yes, sir.

Q. State what the signal was?

A. Well, there are five blasts of the whistle to call the flagman in from the east, and when the flagman gets in he generally gives him a go-ahead signal like that (illustrates by motion of hand), and of course it is answered by two short blasts of the whistle.

By Mr. Allen:

Q. Well, you have stated that you started up in obedience to this signal, on the main line; then what did you do?

A. Well, after seeing that we had the main line movement, and

a clear block—that is, I mean, no orders for us, and it indicated to us that we had the block for 27 miles—I had nothing to do but begin firing the engine; in other words, I hooked the fire over and began to put in a little coal at a time—not but two or three shovelsfull—in order to keep up the pressure and get away from
37 there; it is up-grade, and we had a very small engine, of the old type, and it caused constant firing; we had to keep putting in a little coal, one shovelful right after another very nearly, in order to keep up steam and not get stalled and stop to blow up steam. I did that up to the moment the collision occured, and had just got in a position to get up on the corner of the seat box to reach for the bell cord; I don't remember whether I ever got hold of the bell cord or not, but that was my intention, to reach far en-ugh to get hold of the bell to give it a pull, and by that time we run into those cars.

Q. What did you run into, so far as you know?

A. Well, my understanding is that we run into some fifteen or eighteen cars, some empty and some loaded.

Q. You say that is your understanding; when did you learn what was the nature of the object you hit there?

A. When did I learn that.

Q. Yes. I mean was it since you struck it, or before you struck it?

A. Oh, since we struck it; it was some minutes—sometime after we struck the cars. I heard them say that night, before I was ever gotten out, what caused the accident.

Q. Did you, or any member of your crew so far as you know, have notice that these cars were on the track there in front of you?

A. No, sir, none whatever.

Q. Well, when the collision occurred what happened to you?

A. I was caught between the tank and the boiler-head; the tank crushed everything and came right up against the boiler-head.

Q. What part of your body was caught?

A. I was caught from my knee down—jammed against the boiler-head.

Q. Which leg?

A. Right leg.

Q. What happened then?

A. I began to suffer; my leg began to roast—burn—and I suffered immensely; there is no way of getting at that.

Q. Do you know how long it was before they got you out?

A. No, I do not. They claim it was some forty-five or fifty
38 minutes—those that got me out. It seemed like it was indefinite to me.

Q. Well, now, what became of you after they got you out?

A. Well, as soon as they arranged to get me out, I was taken down off of the engine by several of them and taken around and put into a small house, there, I believe they call it a supply room, may be, perhaps; I am not sure they call it that, but I think that is what it is; and they got a doctor as soon as they could, and he began to dress my leg and treat it as best he could, I suppose, under the conditions; he had mighty poor light; I was suffering awfully.

Q. How long did you stay there, and where did you go from there?

A. I don't know just what time we left there, at all; the only thing I know, we arrived at the hospital about 8:15 the next morning.

Q. What hospital did you go to?

A. Grace Hospital.

Q. In Richmond?

A. Yes, sir.

Q. Well, what happened to you there, Mr. Carnahan?

A. Well, as soon as I got there—I was suffering so—it was not long, it seemed to me like, before they began to take the bandage off that this doctor up here had bandaged the limb up, and treated it, and give me something to make me rest easy, and they kept that up for several days; it was amputated on the 12th.

Q. Your leg was amputated on the 12th?

A. Yes.

Q. Now just describe to the jury—and I want it for this record as well—the point at which they did amputate your leg; how far above your knee, and how far below the crotch?

A. Well, you can see I have on a reducer here. Some of you gentlemen, if you feel like it, can feel the end of it; it comes up to about there (indicates).

Q. What distance is that from your crotch?

A. I suppose it is, may be—I couldn't say—I can guess at it—I suppose some eight or ten inches.

Q. Now what is the character of the stub of your leg there, with reference to the muscle and flesh on it?

A. Well, the muscle and flesh is still there yet; it is not shrinking but very little.

Q. Can you show the jury? Remove your pants leg, and show the jury just what condition the limb is in?

39 A. Why, yes, I can do it.

Q. Well, I would like for you to do it, unless there is some objection to it, just remove your pants leg, Mr. Carnahan?

NOTE.—Witness here exposed the stump of his right leg, to the view of the jury.)

Q. Now, Mr. Carnahan, what is the cause of that dark spot which is apparent there?

A. That is where it has been breaking and running; it will practically heal for some ten or fifteen days, or may be more, and then will puff up there and run; just a few days ago it run some; that is a scab there now. That is where I have been treating it in order to get it as tough as possible. The trouble with an artificial limb is, when you put this in it carries the flesh with it, and the skin comes off that bone down there, and you can't stand it.

Q. Have you tried an artificial limb on there?

A. Yes, sir.

Q. You say it presses the flesh and muscles back and leaves the bone exposed?

A. Yes, sir, just skins the flesh over the end of the bone; when you put your weight on it, or put any weight on the limb, it catches it likes that as you put it in; and as soon as you get the least weight on here you have to stop, you can't stand it on account of that soreness in there, and being irritated and running some.

Q. You mentioned having a "reducer" on there; what is that?

A. A reducer is to keep this limb laced as tight as you can stand it and get it to shrink and settle, so you can wear an artificial limb.

Q. Why was it necessary to shrink that?

A. Well, the object in shrinking it, if it continues to stay fleshy, like this, I will never be able to do anything with the limb; it must shrink and get down to hard, firm flesh, in order to stand the pressure; you have got to put it in the socket of the artificial limb.

Q. When you were arranging for that artificial limb what was the relative size of that stub and the other leg right opposite?

A. Well, it measured an inch larger than my natural leg—than my good limb, in other words.

Q. State, while we are on this subject, what you have tried to do in order to get a limb that you could wear?

40 A. Well, I have been trying all I know how to make a success of the one I have. I have seen those people several times and they have made different changes; the last change they made they thought it would help me some—they cut the socket out in order to take the weight off of this end here, and throw it up in the crotch, but you can't stand but very little of it in the crotch; it rubs and get- you sore in a very little while; there is too much weight all in one place.

Q. Mr. Carnahan, I understand from you that you have been trying to adjust a limb there so as to relieve yourself in moving, and that you have up to this time been unable to do so?

A. Yes.

Q. What effect have you experienced from that injury, if any on your nervous system?

A. Well, I have had several nervous attacks, have been very nervous, and so that I could not rest at night.

Q. Did you have similar attacks prior to the time you were hurt? Did you have any attacks of that kind then?

A. No, sir.

Q. How soon after this injury did the first attack occur?

A. Well, as soon as I began to get around on crutches, to amount to anything, I was just nervous.

Q. Mr. Carnahan, state whether or not you suffered any inconvenience from the loss of that leg, in the way of other pain or suffering?

A. Oh, it hurts me right much at times now—pains; it has been for the last day or two paining some.

Q. State whether or not that is a situation you have found yourself in since the injury.

A. Yes, sir.

Q. Just tell the jury something about the recurrence of those pains, whether they are frequent or at long intervals?

A. Well, I don't have them every day or every night, but it has been when it comes somewhere near ready to run a little bit—a day or two before, or a night or two before, it will begin to throb and ache some.

Q. What effect has that injury had upon your earning capacity up to this time? State whether or not you have been able to earn anything since?

A. No, sir, I have not been able to earn anything, or do anything.

41 Q. You have stated that you were fireman for about six and a half years; state to the jury whether you have any other profession or trade that you might follow in lieu of your railroad profession?

A. I have none whatever.

Q. You have stated, I believe, that a fireman in the capacity you were in, was making about $100.00 a month? Did I ask you that question, or not?

A. About one hundred dollars a month.

Q. You have stated also that you stood for promotion?

The Court: I don't think he has said anything about that.

Q. You say you have been firing for about six and a half years; state whether or not you had prospect of promotion?

(Objected to and withdrawn.)

Q. Please state whether or not under the system adopted by the Chesapeake & Ohio Company, the firemen in good standing were in line for promotion, to become engineers?

(Objected to and withdrawn.)

Q. Now, Mr. Carnahan, state whether or not there was a system of promotion, from firemen to engineers, in operation by the Chesapeake & Ohio Railway Company, at the time you were with them?

Mr. Carter: We object to that, as it deals with speculative questions.

The Court: I don't think it does; it is a question whether or not it is a fact; it is for the jury to determine.

Objection overruled. Exception by defendant.

A. Yes, sir.

Q. Mr. Carnahan, state, if you know, what enginemen on the C. & O., both of freight and passenger trains, were being paid, at the time of your injury?

(Objected to; objection sustained: question withdrawn.)

42 Q. Mr. Carnahan, coming back to the time that you arrived at the east signal at Doswell, let me ask you what system of signals the C. & O. used; what system was in use at that time?

A. The block system.

Q. Now just tell the jury briefly what the block system means?

A. Well, the block system is this: they have different locations

of offices—telegraph offices—located along the line, which when you arrive there you either get orders, or it shows a red board; or if a block is white it indicates to you that you have a clear block to the next block station.

Q. What do you mean by a "clear block"?

A. That means it shows white; that is at night it shows white.

Q. When you get a white signal?

A. Yes, a white signal.

Q. That means you have a clear block?

A. That means you have a clear block to the next block station.

Q. It means that you have a clear track?

A. Yes, a clear track.

Q. When you approach a block and get a white signal, what is it the duty of your train then to do?

A. To proceed.

Q. When you approached Doswell and got to this east signal—state to the jury how far that was east of the R. F. & P. Crossing there?

A. Well, fourteen rail lengths.

Q. What would that be in feet—just approximate it as well as you can?

A. Four hundred and twenty feet; about that.

Q. What was the distance across the R. F. & P.? I believe there are double-tracks there—what was that distance?

A. It is about twenty-five feet.

Q. By the way, let me show you this thing—we can come at it better, perhaps, from this. (Here produces a drawing.) This is not designed as an accurate map, but just so that the jury may get a general idea of the situation there. Now, Mr. Carnahan, this direction is east (indicates on map). Point out there the signal post at which you get the signal first?

A. We stopped about at this point (indicates), and we
43 found it in this position, which means red—indicates stop. This paddle there is the one we got, right here (indicates).

Q. That is the east signal you got, red?

A. East signal.

By Mr. Leake:

Q. The far signal?

A. Yes.

By Mr. Allen:

Q. That signal stopped you?

A. Yes, that signal stopped us.

Q. Then after you stopped, what did you get from that signal before you started?

A. We got this top one—the white one, on top; changed from red to white, which indicates pass; no orders here. We had no orders here at this tower.

Q. Indicate the tower.

A. There were no orders at the tower; under those conditions we had main-line movement, clear block to the next block station.

Q. Is that what those signals would have meant to you down there?

A. Yes, sir.

Q. Now you say that east signal was 420 feet about, east of the R. F. & P. Crossing?

A. Yes, sir.

Q. And what is the distance across the R. F. & P. tracks?

A. Twenty-five feet, about.

Q. Then what is the distance from the tracks to this public road crossing here west of the depot?

A. Six hundred and ninety feet.

Q. How did you ascertain that measurement—by rail count or measurement?

A. By the rail count.

Q. Now what is this siding running out from west of the road crossing, in a northerly direction?

A. That is what they call the North Y,—a new Y.

By Mr. Leake:

Q. There are two tracks there?

A. Yes, sir, two tracks.

By Mr. Allen:

Q. Now what is the siding running out just east of the public road, in a northerly direction, by the tool house?

44 A. That is the depot track—running to the freight depot.

Q. Now, Mr. Carnahan, the track west of the house, between the tool house and the depot, on the north side of the main C. & O. line, crossing the road and entering the main line above here (indicates)—what is that track called?

A. Passing siding.

Q. Now where were these dead-head cars standing on the main line, so far as you know?

A. Well, my understanding is they were about at that road crossing.

Q. There is a side-track leaving *the* south of the main line, just west of the public road crossing, and extending east nearly to the depot; what is the name of that track?

A. South siding.

Q. Then there is a track extending from that, in a southerly direction, into the R. F. & P. tracks; what is that named?

A. That comes under the same heading, south siding.

Q. Is there not something about the "South Y," in there?

A. South Y—well, South Y you can call it.

Q. Mr. Carnahan, who was your engineer on 97 the night of this occurrence?

A. Mr. E. L. Bailey.

Q. Who was your conductor?

A. Captain McGraw.

Q. Who were your brakemen, if you had any?

A. Mr. Gibson and Mr. Clark.

Q. Do you know anything about the crew that was there as Extra 596, who put these cars on that track there—the dead-head cars?

A. My knowing that they were there, do you mean?

Q. Yes.

A. Yes, sir, I knew they were there; I saw them when they came around the R. F. & P. siding and backed into the south siding there.

Q. Where were you when you saw that?

A. Standing at the east signal, at the red board.

Q. Who was the crew on that train, do you know?

A. Captain Shisler was the conductor, and Mr. Blue was one of his brakemen, and Mr. Wilkinson was another brakeman; the engine crew was Mr. M. E. Lane, engineer; and Mr. Len Hartman, fireman.

45 Q. Now, Mr. Carnahan, what sort of a night was the night you arrived at this signal? Was it a bright night or a dark night?

A. It was rather a dark night; seemed to be unusually dark.

Q. State whether or not it was possible for you to have seen the cars from this east signal here, that were blocking the main line at that road crossing, under the conditions of darkness there?

A. No, sir, I could not have seen them.

Q. Did anybody advise you or any of your crew, or did you have any reason to believe or suppose, that there were cars standing on the main line about that road crossing up there?

A. No, sir, none whatever; didn't know anything about it; had no message or any notice of any kind.

Q. Did you have any intimation or warning, after your engine started, that there were obstructions up there?

A. No, sir.

Q. You have stated that your recollection is that you stopped firing and reached for the bell cord, and you don't know whether you got it or not; just state to the jury why you were ringing that bell, or wanted to ring it?

A. Well, after going the distance we had gone, I was under the impression we were somewhere near the road-crossing, and for that reason I was aiming to reach the bell to give it a pull.

Q. For that public road crossing?

A. For the public road crossing, yes.

Q. I wish you would state to these gentlemen whether or not you had rendered the company efficient and satisfactory service as fireman, and what your effort was in that direction, both in regard to learning the management of engines and in handling air?

A. Well, I could do it about as good as any of them—and rather better than the average.

Q. What do you mean you could do as good as any of them?

A. Run the engine or handle the air either.

Q. What do you mean by the "air"; probably the jury would not quite understand you?

A. The air is what you apply the brake with.

By Mr. Haw:

Q. And control the train with?

A. Yes, sir, control the train.

Q. The engineer has to do that, and the brakemen?

46 A. Yes, sir, the engineer does it.

By Mr. Allen:

Q. State whether or not you were making a study of that, and had passed examinations on that?

A. I hadn't passed any examinations, any more than through an air class they had here at the Y. M. C. A., at Richmond, by the Air Inspector. I had taken lessons there—written questions, you know, for us to answer.

By Mr. Carter:

Q. I understand you to say that it was not your duty to do these things, as fireman?

A. No, it was not my duty, but I could do it.

By Mr. Haw:

Q. Don't the fireman very often have to handle the train?

A. We do do it very often in places where we switch—if you are a competent fireman, and the engineer knows it is perfectly safe for him to do it.

By Mr. Allen:

Q. I will ask you whether or not the company required firemen to study those things—to be proficient in air?

A. He will certainly have to study it if he ever gets promoted.

Mr. Carter: We object to that, on the same grounds as mentioned before.

The Court: I don't see the relevancy of the question, unless it is a part of his duty as fireman.

Mr. Haw: He said very often the fireman had to handle the train; that it is constantly done; and I know it to be a fact; I have seen it done.

Q. You stated that you had been taking lessons at the Y. M. C. A. Now under whose authority were you taking those lessons? Who was teaching you, and why were they teaching you?

A. They were teaching us to have the best results possible.

47 Q. Who was having that done? Who was paying this man to do that? Who was employing him to do it?

A. The Company.

Q. The Chesapeake & Ohio Company?

A. The Chesapeake & Ohio Company—that is my understanding.

Mr. Leake: We object to that. He has not stated that it was in the line of his duty. We do not think its relevancy towards any line of promotion should be admitted in evidence, and we move to exclude it.

The Court: I don't see how it would likely affect the question of damage, if that is what you are after:—any idea that he would be promoted because people generally were promoted, of course seems

to be merely speculative, and not evidence to show that he would be promoted.

Mr. Allen: Very well, sir; we will let Your Honor strike out what Your Honor thinks proper to strike out.

The Court: That part ought to be stricken out that is introduced for the purpose of showing damages other than in his capacity as fireman, I think—any that is merely speculative.

Cross-examination.

By Mr. Carter:

Q. Mr. Carnahan, you stated that you knew there was a crew of another train at Doswell that night, did you?

A. Yes, sir.

Q. You knew then there was another train there?

A. Yes, sir.

Q. Did you know what sort of a train it was, whether it was a passenger or freight?

A. Well, I presumed from the class of engine that it was a freight train.

Q. Did you know that that train was shifting and standing around there, or did you know what it was doing?

A. Well, I can not say that I did know what it was doing; I could not see the movement, or what they were doing.

Q. You were uncertain whether that train was standing there to let you go by, or whether it was shifting cars—pulling them
48 in and taking them out? Were you uncertain about that matter?

A. He was standing, as best I could see, when we got the white signal to proceed.

Q. Could you see the train?

A. I could see the engine.

Q. Whereabouts was the engine?

A. The engine was standing on that South Y.

Q. Was the engine facing towards you?

A. Yes, sir, headlight facing east.

Q. Was that train coming east?

A. That is my understanding.

Q. Did you see what cars were behind it?

A. No, sir.

Q. Now a C. & O. engine on the South Y could only get back on the main track by backing, and going on to the main track, could it not? It could not pursue the South Y and get on to the Chesapeake & Ohio track?

A. Why, he had to go through the North Y, and down the R. F. & P. siding, and back up the South siding.

Q. That would be a very roundabout way to get back on the main line track, would it not?

A. That is what he would have to do, to get his engine turned around.

Q. To come down on the Fredericksburg track, and get on the North Y, and come in?

A. No, my understanding is that he backed through the North Y, out on the R. F. & P., down the R. F. & P. sidetrack and back into the South siding.

Q. That is the way you thought he got there?

A. Yes, sir.

Q. Well, now, you said these cars—were they the cars that had been attached to that train?

A. My understanding was that they had been.

Q. Now you say they were there about the road-crossing, when you struck them?

A. Yes, sir, that is my understanding since—that they were standing about the road-crossing.

Q. They were not standing across the road, were they?

A. Well, I didn't say across the road; I said about the road crossing.

Q. It is not usual or proper for a train to stand across a crossing, is it?

49 A. No, sir.

Q. The crossing of the county road, I mean?

A. Yes, the crossing has no right to be blocked.

Q. Then they were not on the east side of the county road, were they, towards the R. F. & P. tracks?

A. No, they would be west.

Q. So that if they were at the crossing they must have been immediately west of the crossing of the road?

A. Yes.

Q. Now you say you had gotten up to ring the bell for that crossing, at the moment you struck the cars?

A. Yes, sir.

Q. You think you had just gotten up, but had not reached the bell?

A. I don't remember having reached the bell cord.

Q. How far do you generally ring—or, is there a rule for you to ring the bell before you get to a railroad crossing or public road crossing?

A. Well, may be two hundred feet of the crossing, or something of that kind.

Q. Yes. There is a statute about it, and I thought there was a rule of the railroad; it was your duty as fireman to ring that bell before you got to the crossing.

A. Not necessarily so.

Q. It was not your duty? Who rings it, if you don't, if it has to be rung?

A. Well, the cord is attached there very near as convenient for the engineer to ring, as me.

Q. Do you mean to say that it is the engineer's duty, and not the fireman's, to ring it?

A. No, sir, I don't.

Q. Is it not the fireman's duty to ring the bell, and the engineer's to sound the whistle?

A. The engineer is supposed to sound the whistle——

Q. Who rings the bell?

A. —and he rings the bell sometimes; the fireman rings it if he has time—if the engine is drifting. and not raising steam.

Q. In other words, he just rings it when he is at leisure, is that your idea of it?

A. Yes, sir.

Q. Do you get any instructions from the Company, along that line, only to ring the bell as you approach a crossing when you are at leisure?

50 A. I think the rule will explain it to you.

Q. You are familiar with the rules, are you not?

A. No, sir, I am not altogether familiar with them.

Q. Did you have them?

A. Yes, sir.

Q. And sign receipts stating that you had read them over, when you accepted employment?

A. Oh, yes, we are supposed to be examined on the book rules.

Q. Now, this is the form of receipt—and by the way, I believe they have your signature to it—here is your name*d* signed: "Received January 6th, 1906, of the Chesapeake and Ohio Railway Company, a copy of the 'Rules Governing Employes of the Chesapeake and Ohio Railway Company, in effect January 1st, 1899,' containing conditions of employment and rules governing its employes; all of which I promise to read carefully and to comply with their stipulations." Signed, "A. P. Carnahan," and witnessed. That is your receipt, is it not?

A. I think so.

Q. Now that is one of the rules of 1899. Is there any change in them, in this respect, up to this year?

A. No, sir, none that I know of.

Q. Now that rule says, with reference to ringing the bell: "The engine bell must be rung on approaching every public road crossing at grade, until it is passed; also when passing stations and through tunnels. The whistle must be sounded at all whistle posts." That is right, is it not?

A. That is right; but wait a minute. Does it say who shall do it?

Q. No, but I was asking you about that, and you say the engineer must do it. It is your habit to ring the bell before you get to a crossing, and you were fixing to ring it then?

A. That was my intention.

Q. And it was your duty, was it not?

A. I can't say that it was any more my duty than the other man's.

Q. You think it was the duty of both of you, then?

A. I think so.

NOTE.—The Court here took a recess for dinner, until 2 o'clock P. M., and upon reconvening the same witness was further cross-examined as follows:

51 By Mr. Carter:

Q. Mr. Carnahan, it is your duty, as well as that of the engineer, to look out in front for obstructions and other matters on the track, is it not?

A. As far as I can. That is, Mr. Carter, I reckon I will make it a little plainer to you—as far as I had the time. Now the night of this accident it was necessary for me to fire this engine and to keep constantly after this engine, because we had on an old type of engine, and a small one, and we had a very heavy train for that class of engine, and I was constantly firing it—had to put in may be from one to three shovelsfull of coal, something like that—had to keep the pressure up, and keep the train from being stalled; and when we left there I was under the impression that we had a clear block for 27 miles, nothing to obstruct us that I knew of.

Q. But it is your duty to look out?

A. Yes, it is my duty, as far as I have the time to spare—when I am not otherwise occupied in trying to keep the engine hot.

Q. Mr. Carnahan, did I understand you to say that you had a right to rely on the block system, and disregard any other rules and regulations and cautions in running, if the block signal indicated a clear track ahead of you?

A. What do you mean?

Q. Did you in your testimony state, or mean to convey the impression that when there was a block signal—white signal—that you had a right to disregard all other precautions which you might otherwise take, and run the train as if you knew there was nothing ahead?

A. No, sir, not in every case I did not.

Q. You did not mean that in every case?

A. No, sir.

Q. Now I will read you Rule 301, about block signals, which is in this little book that you state you are familiar with: "Block Signals, unless otherwise provided, do not affect the rights of trains under the time-table or train rules, nor dispense with the use or the observance of other signals whenever and wherever they may be required." That is one of the rules you were running under?

A. That's right.

Mr. Carter: That rule is offered in evidence by counsel for the defendant, as well as the rule read sometime ago—Rule 31—as to the ringing of the bell.

52 Redirect examination.

By Mr. Allen:

Q. Mr. Carnahan, you were asked something about whether or not you saw that engine on the South Y, and you stated that you saw that engine there—it was headed east, with the headlight on it?

A. Yes, sir.

Q. State whether or not you saw anything else, beyond that engine, up this way?

A. Well, I couldn't say; I saw this engine at the time, before we

got the *movement* to move, when she backed in there and stopped, it seemed like, the best I could see; and of course after he got in that position in there and stopped, why then we got our red signal, came white, and that meant for us to proceed.

Q. What was there about that engine that caused you to see that?

A. I just happened to see the view looking in that direction—looking west from where we were standing.

Q. You say the engine was headed east?

A. Yes, sir.

Q. Was there any light about the engine?

A. The headlight—that was the only thing I could say that I could see, that I knew this was an engine—the headlight on it.

Q. Will you tell me where, on this South Y, this engine was standing? Here is the signal (indicates).

A. I can say he was standing along in there somewhere, where you have that pencil (indicates).

Mr. Leake: Indicate it, in the record.

Witness: I couldn't state now where that engine was, but it was about there (indicates) as near as I could state.

By Mr. Haw:

Q. And you were off here on the main line?

A. Yes.

By Mr. Allen:

Q. It was not quite half-way between the R. F. & P. track and where this siding went into the other siding—where the South Y entered the South siding?

53 Mr. Carter: Does he say that?

Mr. Allen: He indicated the point. Mr. Leake wanted it indicated on the record.

A. I would suggest about that; that is the best I can come to it.

Q. Mr. Carter has read a rule to you respecting the ringing of the bell of an engine while passing a station, and approaching public road crossings. I wish you would state to the jury just what you were doing from the time you left the signal post—the east signal—until you passed through up here and had that collision. Just state what you were doing?

Mr. Carter: Now, Your Honor, he has stated that more than once, I think.

The Court: He has stated generally; I don't know whether there is anything in the record to show what he was doing all the time.

A. You want me to state now how my time was occupied from the time I started?

Q. Until you reached for that bell cord?

A. Well, after we got the white signal, that meant to us a clear block, I noticed ahead that there were no orders for us—that is the order signal—it displayed the white signal; as soon as the engineer opened up and got his train started I began to work on my fire; we

have what we call a "hook"; I hooked the fire over and got it burning bright, and began putting in coal and feeding it, allowing the door to be shut may be for a moment; and did that up to the time we had gotten up there somewhere where I thought we were near the crossing. It is my habit to try and ring the bell for these places, if I can, and my intention was to get the bell cord, but whether I got hold of the bell cord, or not, I am not able to say.

Q. Now when you opened that door to put in coal, or hooked the fire over, as you called it, on that night which you say was dark, what effect did that have on the light in the cab?

A. Why, it throws a great reflection all in the cab; for a minute or two after the door is closed it blares, and you can't see anything ahead of you or around you.

Q. Do you mean it affects your eyes that way?

54 A. Yes, sir, affects your eyes that way.

(Witness here stood aside.)

WILLIAM MCGRAW, being duly sworn on behalf of the plaintiff, testified as follows:

By Mr. Allen:

Q. Captain, in whose employ have you been for the past few years?

A. The Chesapeake and Ohio Railway Company.

Q. In what capacity?

A. As conductor.

Q. Are you a conductor of freight or passenger trains?

A. Freight and passenger—freight train.

Q. Where were you on the early morning of March 7th, 1913?

A. I was on train No. 97 out of Richmond, on the way to Charlottesville.

Q. When you got to Doswell, Captain, did anything check you up there?

A. Yes, sir.

Q. What was it?

A. Semaphore signal—red signal.

Q. Was that at the east of this R. F. & P.—this semaphore?

A. Yes.

Q. What did that red signal indicate, in railroad parlance?

A. Stop.

Q. How long did you remain there?

A. Five to seven minutes.

Q. Then what kind of a signal did you get?

A. White signal.

Q. What did that indicate?

A. Proceed.

Q. Was that white signal a signal for the use of the main track ahead of you?

A. How's that?

Q. Did the white signal at that time indicate to you that you had the use of the main track ahead of you?

A. Yes, sir.

55 Q. Are there any other signals there about the tower building, that you have to watch when you go by there?

A. Yes, sir; train order signal.

Q. Where is that located?

A. On the tower.

Q. The tower, I believe, is the place where the operator and signal man works, is it?

A. Yes, sir.

Q. Captain, do railroad employees in the movement of trains get their signals at that point?

A. How is that, Mr. Allen?

Q. Do the C. & O. employees, in the movement of trains, get their signals from that point—that tower—as they pass Doswell?

A. They get their signals from the tower.

Q. From the agent or employe in that tower?

A. From the employe in that tower.

Q. What did the order display on the morning of the 7th, that we are speaking of?

A. White.

Q. What did that mean, sir?

A. That there were no orders for us.

Q. Well, then, what did your train do when you saw that white signal?

A. Started off—proceeded, sir.

Q. West?

A. West.

Q. Then what happened after that?

A. We collided with a cut of cars.

Q. Captain, do you know where those cars were located? Could you tell us about where they were located? We have a drawing here of the situation, if you would like to look at it. (Drawing is here again produced.)

A. I can show you, may be, from that. It was at the county road there, right on the crossing.

By Mr. Haw:

Q. Which side was the point of collision, in the road?

A. My recollection is right in the road.

Q. Did you notice after the engine——?

A. Our engine was on the road crossing.

Q. Did it stop immediately it struck it, or did it push the others back a little?

A. Well, it pushed the others back, I guess.

56 Q. How far?

A. I don't know how far; they were back from the engine a little ways, may be, I don't know.

Q. It pushed them back after they come in collision?

A. Yes.

Q. And the engine stopped on the crossing?
A. Right on the crossing.
Q. On one edge of the road-crossing, or in the middle of it, or how?
A. Right on it, as well as I recollect; the front part of the engine was, as I recollect, right on the crossing.
Q. And had pushed the other train some distance, after the collision?
A. They had been knocked back.
Q. How far did the engine move after the collision?
A. I don't know.
Q. Did it move any?
A. It came to a ram, and stopped, I suppose; I don't think it did.
Q. What became of you?
A. Well, I remained in the cars as well as I could; I was bounced around a little.
Q. They evidently came into collision then before you reached the road crossing?
A. Right on it.
Q. You say they stopped on it, I think?
A. They stopped on it; that is, where it hit—as well as I recollect.
Q. When those signals are given to a train for moving, does the engineer start the engine without *without* signal from you, or do you have to signal?
A. They are supposed to get a signal from the rear.
Q. I know, but if he sees the light does he move right off, or wait until he gets a signal from you?
A. He can move off, but he got a signal from the rear of our train, before he moved.
Q. Did he get it from you?
A. He got it from my flagman.
Q. Who was that?
A. The flagman protecting the rear of the train, he was called in by the whistle.
Q. He was called in by the whistle?
57 A. Yes, sir.
Q. Then what signal did the engineer get?
A. He got a proceed signal, with a lamp, from the flagman.
Q. So then the engineer had not only the white light at the starting point, where he got the signal to start, but he also had the signal from the flagman who was called in; then he saw no signal to stop for orders, so there was nothing else for him to do but to go ahead, was there?
A. Go ahead.

By Mr. Allen:

Q. How fast was the train running?
A. I suppose about ten miles an hour.
Q. You say that the engineer called in the flagman by the whistle. How many blasts do you give to call in the flagman?
A. Five.

Q. What do those five blasts indicate to parties who know that a train is standing still—I mean the railroad parties?

A. That it calls in the flagman.

Q. Now where a train is standing under a red signal, and the flagman is called in by that means, what do they understand is going to be the movement of that train?

A. Proceed.

Q. Captain, do you remember what kind of a night that was, whether it was a dark night, or not?

A. No, I don't remember about how dark it was. I do remember it was a very cold night.

Q. What condition did you find Mr. Carnahan in after the collision?

A. I found him pinner between the tank and boiler.

Q. How long did he remain in that position, before you could get him out, Captain?

A. About forty-five minutes, I think it was.

Q. Did any one notify you of the presence of those cars standing on the main track ahead of you up there?

A. No, sir.

Q. Captain, was it possible for you to have seen those cars from the time when you stopped down here, if you had looked from that point up this way, that night?

(Objected to, and withdrawn.)

58 Q. Did you get out so that you could see around you, when your train was stopped down there?

A. I did not get out then; I raised a window and looked out.

Q. How far could you see westward along this main track, sir?

A. You see the engine and a car was between me and that, Mr. Allen—the track—I didn't see any on the track.

By Mr. Haw:

Q. Is there no curve in there?

A. It's a straight line.

By Mr. Allen:

Q. Something has been said about another extra train being in on these Y switches there that night. I wish you would state whether or not you knew of the presence of that train there?

A. No, sir, I did not; I had no notice of that train being there.

Q. If it be a fact, Captain, that that crew of the Chesapeake & Ohio Railway Company placed those cars on the main line, on or about this crossing, what would have been the duty of the conductor and train crew there in respect to protecting them by signals, as against your train or any other train?

A. Well, the duty would have been to protect it—it is an interlocking plant, and I don't know what arrangements they made.

Q. I understand, but what would be, under the rules of the company——

A. It would be the duty to protect it.

Q. In what way, Captain?
A. With flags, of course.
Q. Or lights—at night?
A. Or lights—well, flags—that means lights.
Q. Do you know whether or not there were any flags or lights indicating the presence of those cars up there?
A. I don't know.
Q. I believe you have stated that Mr. Carnahan was caught between the tank and the boiler head; will you state about how long he remained in that situation?
A. I said about forty-five minutes.
59 Q. State how you finally got him loose from there, if you please?
A. Well, we tried every way; we took an engine, it was on the siding next to that track, and attached a chain—a large chain—to some cars and to the tank, and pulled it back off of him and released him.
Q. Which track was that engine on, the South Y?
A. The South Y.
Q. Then to do that you would have to bring it over the South Y, on this south siding?
A. It was already on there.
Q. Was already on the siding, or on the South Y?
A. It was on the South Y siding.
Q. How would they bring it up here (indicates)?
A. Just back it up to the crossing. We didn't get the engine back that far; there were some cars attached to the engine, and we put chains to a car and pulled the cars with the engine.
Q. And then had to pass from that South Y there, and come in on this south siding——
A. It was already in the South Y.
Q. But I say they had to come from the South Y into the south siding?
A. I don't know how he got in there.
Q. It was already on it when you passed?
A. It was already in there when we passed.
Q. You had to pass by this engine when you came up here where you had your engine, didn't you?
A. Yes, sir; our train had not entirely passed it, but the engine had.
Q. And really you went on by that engine?
A. Yes, sir.
Q. Captain, of what was your train composed that night?
A. Passenger equipment.
Q. What kind of cars were they?
A. They were tourist cars.

Mr. Leake: We have admitted all that.
Mr. Allen: Well, that is so; there is no need of going into that. You admitted that there were eight, did you not?
Witness: There were seven tourist cars, and a coach.
60 (Witness here stood aside.)

J. R. SHISLER, being duly sworn on behalf of plaintiff, testified as follows:

By Mr. Allen:

Q. Captain, in whose employ were you about the 7th of March, 1913?

A. C. & O.

Q. How long had you been in the employ of that company?

A. A little over eleven years.

Q. In what capacity were you working?

A. Conductor, at that time.

Q. Freight or passenger?

A. In the freight service.

Q. Where were you running particularly—I mean on what division were you running on the morning of the 7th of March?

A. Between Richmond and Charlottesville.

Q. Where were you about two o'clock in the morning of that day?

A. At Doswell.

Q. When had you come to Doswell?

A. I arrived at Doswell about 11:37 that night, P. M.

Q. What was the number of your train, sir?

A. Extra 596, to Doswell.

Q. Did you see 97 when it arrived there, or soon afterwards?

A. No, sir, 97 had arrived there before I seen it, but I seen it a few minutes after it arrived.

Q. Where was it when you saw it?

A. It was standing at the home signal, just below the telegraph office.

Q. You mean by that the signal post east of the R. F. & P. track?

A. Yes, sir.

Q. How long did 97 remain at that signal, do you think?

A. I could not say—something between five and ten minutes, I suppose.

Q. Captain, something has been said in this evidence about a collision with cars left about the public road crossing there at Doswell, on the main line. Will you be kind enough to tell the jury about that? Just tell them in your own way?

61 A. Well, I had fifteen cars on the main line at that time; I think it was about fifteen—fifteen or sixteen, I would not say just which, now, but about fifteen I think it was, standing on the main line.

Q. Was there a caboose attached to the west end of those?

A. Yes, sir.

Q. Was there anything attached to the east end? Did you have an engine to that?

A. No, sir, the engine was in the side-track.

Q. How long had those cars been there, Captain?

A. I could not say exactly, something between thirty minutes and an hour, I would suppose; that is, a part of them; a part of them I had just put out there

Q. Captain, I would be glad if you would state whether or not the signal man in the tower there knew of the presence of those cars on the main line?

A. He did, sir.

Q. How do you know that he knew of that?

A. Because I had arranged with him to do my switching there, and also arranged with him to turn that train through the side-track.

Q. To turn 97 through the side-track?

A. Yes.

Q. Captain, were you protecting the front of those empty cars there on the main line, by signals of any kind, when 97 approached?

A. Nothing more than through the operator and this home signal.

Q. The home signal—that was the signal east of the R. F. & P.?

A. Yes, sir.

Q. Do you remember, Captain, whether it was a dark night that night?

A. Well, I couldn't say just concerning the darkness, but I think it was tolerably dark. I don't remember now just how dark it was, but it was a dark night—the moon was not shining.

Q. Captain, do you recall what was the character of light, if any, on the front of engine 199, that was drawing train 97?

A. On engine 199 I think it was an oil light.

Q. Oil lights, I believe, are not as brilliant as the electric head-lights?

A. Oh, no, sir.

62 Q. Captain, those fifteen or sixteen cars that you say were located on the main line—just state, if you can, sir, where they were left standing, about at what point?

A. Just about the road crossing, to the west switch—the rear of them was about at the west switch, so as to clear the side-track switch—and from there extending towards the office.

Q. Did you see Mr. Carnahan after this collision?

A. Yes, sir.

Q. What position was he in when you saw him?

A. His foot was caught between the boiler head and tank.

Q. How long did he remain in that situation?

A. I couldn't say just how long, Mr. Allen; I think it was something like thirty or forty minutes, or may be more, I couldn't say just how long.

Cross-examination.

By Mr. Carter:

Q. How far were you, Captain, from the engine on the train on which this gentleman was hurt, when you saw it stop? How far were you, at the time?

A. You mean after it struck?

Q. No, sir, when you first saw it, when it was standing east of the R. F. & P.

A. When I first saw the engine I was about at the telegraph office.

Q. About how far is that?

A. I couldn't say just exactly how far that is; it is something like fifteen or eighteen rail lengths, I suppose.
Q. How long are the rails?
A. The rails range from twenty-eight to thirty feet.

Redirect examination.

By Mr. Allen:

Q. In speaking of seeing the engine at this east signal post, state whether or not the headlight was in view from the point from which you saw it?
A. From the office, where I seen it? Yes, sir, the headlight was in view.
Q. What do you call the office?
A. The telegraph office.
Mr. Haw: Is that this high up one?
63 Q. The telegraph office is in the tower, I believe?
A. Yes, sir.

By Mr. Haw:

Q. Were you up in that tower?
A. I was up in that tower.

(Witness here stood aside.)

T. D. BLUE, being duly sworn on behalf of plaintiff, testified as follows:

By Mr. Allen:

Q. Mr. Blue, please state, sir, in whose employ you were on the morning of March 7th, 1913?
A. I was employed by the C. & O. Railway Company.
Q. In what capacity?
A. Rear brakeman on extra 596.
Q. How long had you been braking for the C. & O. Company?
A. About six years.
Q. Extra 596 was moving in which direction, sir, from Richmond?
A. It was moving westward from Richmond; it was headed westward.
Q. Where did you see train No. 97 that night?
A. I seen it at Doswell.
Q. What time was it; do you recall about what time of the night that was?
A. Somewhere about two o'clock.
Q. How long had you been at Doswell before 97 arrived?
A. About two hours and thirty minutes, something like that.
Q. What were you doing at Doswell, Mr. Blue,—your crew?
A. We were working at Doswell, getting cars out to bring them back to Richmond.
Q. You were making up a train to take back to Richmond?
A. Yes.

Q. In making up the train and putting the cars in line and taking them back to Richmond, where did you leave them, sir?

A. The cars that we got from Doswell to bring back to
64 Richmond, we pulled them out of the North Y and set them on the main line.

Q. Do you recall how many cars you had on the main line when 97 came up to the east signal post?

A. I know we had a number—I don't know positively, but I heard someone say there were fifteen.

Q. Mr. Blue, were any signals placed, or lights, to protect those cars on the main lin*t*, that you recall?

A. There were signals on the rear of it; after we set them on the main line we put a caboose car on the west end.

Q. You had a signal on the west end?

A. Yes, sir.

Q. Was there any signal on the east end?

A. No, sir.

Q. Was there anybody stationed there to warn other trains approaching from the east of the presence of those cars?

A. You mean——

Q. A flagman?

A. No, sir.

Q. Do you recall what kind of a night that was, Mr. Blue? Was it a dark or bright night?

A. I do not.

Q. Now when 97 moved out from that signal, which way did it proceed, sir?

A. It proceeded westward.

Q. Do you know whether or not the signals the order signal at the tower, and the signal at the east signal post—showed white?

A. I do not.

Q. Was there any way that 97 could have been put by your dead cars up here on the switches at that point?

A. Yes, sir.

Q. Which track would it have taken to have gone around your train?

A. Through the passing track.

Q. Here is a little sketch of it, Mr. Blue: taking this as the east end, towards Richmond, and this going west (indicates on sketch), is that the track you refer to as the passing track?

Mr. Carter: The one on the north of the main track.

Mr. Haw: The one next to the depot, is it not—next to the signal tower.

65 Mr. Allen: There is the signal tower (indicates), and here is the South Y, you see.

A. Our cars were standing in here (indicates), and 97—that is the tower there?

Q. Yes, that is the tower; this is the public road crossing here (indicates), Mr. Blue.

A. Well, our cars were standing—it was above this road crossing

somebody made—any way, our cars were standing between here and here (indicates).

Q. That is between the road crossing and the west end of the switches?

A. Yes, sir. 97 had instructions from the operator—I mean the operator had instructions to let 97 go through the side-track, and our cars were standing here above the road crossing.

Q. And this is the track you indicate as the passing track—the north siding running through there (indicates)?

A. Yes.

Q. Now who gave the operator those instructions?

A. I went up in the tower and remarked to conductor Shisler that 97 was standing down there, and they could let him go through the side-track; and conductor Shisler turned to Operator Beasley and says, "All right, let 97 go through the side-track and I will go up and look out for the switches"; and he and I walked out of the office; I started out ahead of him, and conductor Shisler run by me and said "Tom, you get those two cars, the rear cars at the South Y, and I will look out for the switches"; and he run by me, and our engine was coming back in the South Y, backing to the cars, and I was attending to the coupling of the cars, and I got up on top of the cars to let the brake off, and I heard 97 coming, and of course looked out and he was right on the R. F. & P. Crossing; and then I looked up to see, you know, if the track was lined up right, and I noticed it was not, and I jumped down between the cars, but didn't have time to get over on the other side, and I holloed on the fireman's side as it came by me; I didn't see any one, it came that quick, and was gone.

Q. How long was it after you did that before the collision occurred?

A. About half a minute, or a minute, or something like that.

66 Q. What was the speed of 97 as it passed you?

A. I really don't know.

Q. You don't know how fast it was going?

A. No, sir.

Q. What position did you find Carnahan in after the collision?

A. When it struck I ran up to the engine and looked, but the steam was blowing so I didn't see Mr. Carnahan at first, and went around the engine, and then I met—as I turned to come back I met Mason Lane, engineer of 596, and he told me Mr. Carnahan was fast in the engine.

Q. Just how was he fastened there? What was pinning him there?

A. The tank of the engine had his leg pushed up against the boiler-head.

Q. Do you mean by the "boiler-head"—is that the place against the fire-box?

A. Yes, sir.

Q. Do you recall how long it was before he was gotten out of there?

A. I judge from forty to forty-five minutes.

Q. You have spoken of being up in the tower house there, which

is the switch tower as well as telegraph office, with Captain Shisler. Who did you say was in charge of that office that night?

A. Operator Beasley.

Q. Who was operating the switches while you were in there?

A. It was a colored man pulling the levers; I didn't know whether he was pulling the signals or the switches—I don't know.

Q. Do you know who that colored man was, whether he was an employe of the company, or not?

A. I do not.

Cross-examination.

By Mr. Carter:

Q. Now I understand, Mr. Blue, that you state you had crossed the track, and were on the south side of the main track of the C. & O.—on the same side that the fireman was on—when you saw the train on which the fireman was, going up the main track of the railroad; is that right? You had crossed the track of the Chesapeake & Ohio?

67 A. Yes, sir.

Q. And had gotten on the south side of it; the south side is down towards Richmond?

A. Yes, sir.

Q. And that is the side the fireman was on, is it not?

A. Yes, sir.

Q. You saw the Chesapeake & Ohio train on which this Mr. Carnahan was, going west on the track on which you knew were these stationary cars? You saw that, didn't you?

A. I saw it when I was climbing up; I was clean on the other side of the two tracks—the South Y track.

Q. Yes; well, you were south of this track. You say you didn't have time to get across on the engineer's side?

A. I was on the other side of the cars, you understand. I was on top of the cars when I heard 97 coming.

Q. What cars were you on?

A. On coal cars in the South Y.

Q. In your train?

A Yes, sir.

Q. They were on the south side of the Chesapeake & Ohio main track. I don't mean they were right up at it, but they were south of it.

A. Yes, sir, south of it.

Q. You jumped down off of your car and ran up toward the train that Mr. Carnahan was on, and shouted, and waved them to stop, didn't you?

A. No, sir, I didn't run anywhere.

Q. You didn't run anywhere? Did you walk?

A. I jumped down off the cars and didn't have time to get across the track when I seen 97.

Q. You gave the signal to stop, did you?

A. I gave the signal—I holloed to shut off, just as he came by

me; the engine was right on me; I didn't have time to get across the track.

Q. How far were you east of the cars when 97 struck? When you gave the stop signal how far were you east of the cars that 97 struck—when you gave the stop signal to the crew of 97?

A. From the cars that were struck?

Q. Yes.

A. About eight or ten car-lengths.

Q. So that they were eight or ten car-lengths apart when you gave the signal to stop?

68 A. Yes, sir.

Q. Well, now, did you call at the same time that you gave the signal?

A. I holloed when he went by me.

Q. You holloed all you could?

A. Yes, sir.

Q. And the train that was on the main track, going into these other cars, was that about even with you when you gave the signal and holloed?

A. Yes, sir, right on me; I was between that and the cars.

By Mr. Haw:

Q. What do you mean—the engine of train 97?

A. I was between the cars that our engine had coupled to there, and 97, when they hit, and when I jumped down off the cars I didn't have time to get out from between them; I was in danger myself, standing in between 97 train when it hit, and the cars our engine was coupled to.

By Mr. Allen:

Q. As I understand, 97 engine was passing just as you got down there, and you holloed?

A. I saw it was coming up the main line, and I jumped down, and as I jumped down the engine was right on me, and I holloed to shut off.

By Mr. Carter:

Q. You had a lamp in your hand?

A. Yes, sir.

By Mr. Haw:

Q. You just waved it that way (illustrates), and you were on the left side of the engine?

A. Yes, sir.

Q. A man with his head down working, throwing coal into the engine, could he have seen your signal, do you think?

(Objected to, and not pressed.)

Q. How close were you to the engine?

A. I was right at the engine.

Q. So close you were afraid it would run over you?

A. I couldn't get across the track, no, sir.
69 Q. How high was the engine window above your head?
A. I don't know.
Q. What is your estimate of it?
A. I have no idea.
Q. It was above your head, was it not? You were standing on the ground?
A. I suppose it run along close to a man's head—the footboard.
Q. The walking board?
A. The gang board.
Q. Well, the cab window is higher than that board, is it not?
A. Yes, sir.

By Mr. Allen:

Q. When this engine was passing you, and you were trying to give this signal, was the engine running under steam?
A. Yes, sir—well, I was not handling the engine, but I would judge that it was.
Q. Well, you could tell by the exhaust?
A. Yes, it sounded to me as if it was; but at that time I didn't have the time to notice all those things.

Cross-examination.

By Mr. Carter:

Q. How many car lengths, Mr. Blue, was the car that you were on, when you saw this train coming back, from your engine—the engine on your cars? How many car-lengths was it behind your engine?
A. Two or three. The brake was setting very tight; we went to back up and could not move, and I went up on the car to let this brake off, when I saw the danger.
Q. About how long is a car?
A. A car runs from 28 to 34 feet, I think. I think these coal cars are about 28 or 30 feet—along in there.

(Witness here stood aside.)

A. P. CARNAHAN, the plaintiff, recalled, further testified as follows:

By Mr. Lane:

Q. Mr. Carnahan, you have stated that you were in Grace Hospital; how long did you remain in there?
70 A. About six weeks, or may be a day or two over that, I don't remember; but it was about that length of time.
Q. I omitted to ask you about the character of the headlight you had on your engine on the morning of March 7th. Just tell the jury whether it was an electric light.
A. No, we had the ordinary oil lamp—old style oil lamp, rather.
Q. Are those as powerful lights as the modern electric headlights?

A. No, sir; they give about headlight enough for anyone to know that there is a headlight on the engine: you can see it some distance.
Q. How about the light from behind the lamp, looking ahead?
A. Why, it don't amount to anything, you might say, as far as light is concerned, in seeing the track or anything.
Q. From the character of the injury you sustained, state whether or not you could fire an engine now?
A. You mean to fire an engine again—in the future?
Q. Yes.
A. I don't see any chance of it; I don't see that I could do it; I don't know; I don't see any chances of doing it, at all; I have not been able to wear a limb so far, and I don't know when I will be able to wear one.
Q. If you were wearing a limb could you fire an engine, with the speed and motion, and all that?
A. No, sir.

By Mr. Carter:

Q. Mr. Carnahan, was this the engine you generally ran—the one you were on that night?
A. No, sir.

By Mr. Allen:

Q. I don't know whether I asked you, or not, about the protection of that boiler head or fire-box; that is, whether or not on the outside of that there was any protection—asbestos or anything?
A. Nothing whatever; nothing but the naked iron.
Q. When that fire was burning in the engine, hot, what was its effect on that part where your leg was fastened?
A. Oh, it was as hot as blazes.

71 (Witness here stood aside.)

The plaintiff having rested his case, the defendant, to maintain the issue on its part, introduced the following evidence:

J. L. HARTMAN, sworn on behalf of defendant, testified as follows:

By Mr. Carter:

Q. Mr. Hartman, you are in the employment of the C. & O., are you?
A. Yes, sir.
Q. Are you summoned by both sides in this case?
A. Yes, sir, by both sides—by the C. & O. and by Mr. Carnahan.
Q. You were on the freight train that was shifting and standing there?
A. Extra 596.
Q. Whereabouts on the train were you?
A. On the engine.
Q. You were then on the engine standing on the South Y, when

the train on which the plaintiff in this case was, passed by, were you?

A. Yes, sir.

Q. Will you tell whether or not you spoke to him, or spoke to the fireman on the train?

A. Yes, I saluted him; I holloed "Hello, Carney."

Q. As the engine passed you?

A. Yes, sir.

Q. Did he return your salute?

A. Yes sir; someone did.

Q. Had he passed you when he returned it?

A. He had passed a short distance.

Cross-examination.

By Mr. Allen:

Q. Did you say someone returned it?

A. Someone returned it; I suppose Mr. Carnahan.

Q. You don't know whether it was Mr. Carnahan?

A. I couldn't say for certain.

By the Court:

Q. What did you say?

72 A. "Hello! Carney."

By Mr. Carter:

Q. Is that his name, or yours?

A. His name. Carnahan's his name; I called him "Carney," you know.

Q. You said, "Hello! Carney"?

A. Yes, sir.

By Mr. Haw:

Q. What position was he in when you spoke to him?

A. I couldn't tell; I don't know.

Q. What part of him did you see?

A. I could not see him definitely; in those engines it is very dark.

Q. What did you see?

A. I could not see him distinctly; I couldn't say.

Q. What position was he occupying?

A. I couldn't tell.

Q. What part of him did you see?

A. I didn't say I saw any of him.

Q. Just tell whether you did see any of him?

A. I did not—I could not say for certain.

Q. You couldn't say for certain you saw the man, at all?

A. No, sir.

Q. You just said, "Hello! Carney"?

A. Yes, sir.

Q. And what did you hear?

A. I heard some one hello back.
Q. Whether he saw you or not, you don't know?
A. No, sir.
Q. And you don't know whether you saw him; in fact you are inclined to think you did not see him?
A. I am sure I didn't see him.

Redirect examination.

By Mr. Carter:

Q. The man you saw was on the engine on which Carnahan was hurt?
A. Yes, sir.
Q. He was on the side that the fireman would be on?
A. The side he is supposed to be on, yes, sir.
Q. And the man on that side replied to your salutation?
73 A. I supposed it was him; I could not swear to it.
Q. You called him Carney?
A. Yes, sir; and someone replied.
Q. And he replied?
A. Yes, sir.

Recross-examination.

By Mr. Haw:

Q. Do you take back what you said just now—that you didn't see him?
A. I don't take back anything; I say I didn't see him to know him; I saw some man.
Q. What part of the man did you see?
A. I didn't say what part; I just helloed; I knew he was on there: I had seen him in Richmond, when he left; and I helloed "Hello, Carney."
Q. You hadn't knocked him to pieces then, when you saw him?
A. I saw someone on the engine.
Q. What part of that man did you see?
A. I just saw him in the dark; I couldn't tell what part of him it was.
Q. Did you see his clothes, and skin?
A. I saw his clothes, I suppose.
Q. What part?
A. I suppose they were his overalls—but I was not taking a photograph of them.
Q. You say you saw them; what did you see?
A. If I saw a person in the dim distance, what would I see? I saw the figure of the person.
Q. What part of the figure did you see?
A. The whole figure, I suppose.
Q. The whole figure, from the feet up?
A. I don't suppose I saw the feet.
Q. What do you suppose you saw?
A. I saw someone on the engine, who I supposed to be Carnahan.

Q. What part of that man did you see?
A. I never have said that I saw all of him.
Q. Did you see his foot?
A. No. I saw his foot after he was hurt; I did not see his foot then.
Q. When he passed by and you said, "Hello! Carney," what part of Carney did you see?
74 A. I saw someone in the dim distance.
Q. What part of him?
A. Well, I saw a man standing up; I couldn't tell whether it was Carnahan or not.
Q. What part of the man did you see?
A. I saw his face.
Q. You saw his face?
A. Yes.
Q. Which way was he looking?
A. I couldn't tell which way he was looking; I don't know.
Q. Did you see his hands?
A. No.
Q. Didn't he have one hand up trying to reach the bell cord?
A. I couldn't see that plain; you must remember it was very dark that night, and he was at some distance.
Q. How far were you from the place where they came together?
A. What do you mean—whether——
Q. When you holloed "Hello! Carney," how far were you from the place where the two trains came together?
A. Ten car-lengths.
Q. How do you remember that so accurately, and don't know what part of the man you saw?
A. Well, I know the track much better than you do.

By the Court:

Q. Can you say where the figure you saw was on the engine? Was he in the cab, or out between the cab and the tender?
A. He was standing on the foot-board when I saw him.
Q. I don't know where the foot-board was.
A. Where you stand down to fire.

By Mr. Allen:

Q. Was he right in front of the boiler-head, where they put in coal?
A. He was in front of the fire part; he was bound to be, if he stood on the foot-board.
Q. So he was right in front of the boiler-head where they put coal in, when you saw him?
A. Yes, sir.
75 Q. And I suppose you saw him as the train swept by you, and that is why you could not tell whether that was him or not?
A. No, I couldn't tell what kind of a necktie he had on him, and everything like that.

Q. You could not say that he was not engaged firing his engine right at that minute, could you?
A. Ask me that again.
Q. I say you could not say now that he was not in the act of firing his engine right at that minute, could you?
A. No.
Q. Or doing something that was incident to firing—putting coal in?
A. No, I could not.

(Witness here stood aside.)

M. FLANNAGAN, duly sworn on behalf of Defendant, testified as follows:

By Mr. Leake:

Q. Mr. Flannagan, what is your business?
A. I am Division Master Mechanic of the C. & O., Eastern Division.
Q. You have been in the railroad service then quite awhile, I imagine, from your holding that position?
A. Yes, sir.
Q. Mr. Flannagan, do you know the character of the headlight that this engine—it was No. 199, was it not?
A. Yes, sir, 199.
Q. —which was on Engine 199, the engine that pulled train 97 the night that Mr. Carnahan was injured? Do you know the character of the headlight on that engine?
A. Yes, sir, it was a standard C. & O., 16 inch oil burning headlight.
Q. That light is not available now, is it?
A. No, sir; not that particular one; but we have others of exactly the same class and character.
Q. Do you know how far a headlight of that type, such as Engine 199 was equipped with, will throw a light on a dark night, so that objects upon the track are clearly discernible by one who is looking ahead?

76 Mr. Allen: Wait a minute. He is a Master Mechanic but that probably does not make him an expert on the question as to how far a headlight would throw a light on the track.
Mr. Leake: Not if he has made a test of it?
The Court: If he has made a test of it, yes.
Mr. Leake: That is exactly what he has done.
Mr. Walsh: He ought to be confined to answering as to a headlight burning in the manner in which that one was burninig that night.
The Court: The jury would not be bound by it, but it will throw light on the proposition.

Q. I will ask you if you made a test of a headlight of the identical design of the headlight with which this engine was equipped?
A. Yes, sir.

Q. What was the result of that test?

A. Well, the result of the test—on a clear night, with no moon—showed that a car or other object on the track could be distinctly seen a distance of three hundred feet or more; in fact the actual figures, measured at a distance of 313 feet—cars could be seen distinctly standing on the rails, in a direct line with the rays of light; while on the tracks adjoining, say from fifteen to twenty feet off to the right, which would be those on the curve, we could see them distinctly at 270 feet.

Q. Was that test made on a dark night?

A. On a dark night—clear though, and no moon.

Q. Mr. Flannagan, did you make a test as to how far an engine running at the rate of ten to twelve miles an hour could be stopped, with the application of such brakes as they are equipped with?

A. Yes, sir.

Q. Within what distance could it be stopped?

A. Well, we find that an engine alone could be stopped within a distance of thirty-five feet, running at from ten to twelve miles an hour.

Q. What effect, Mr. Flannagan, would the addition of cars have attached to the engine, upon its ability to stop within a given distance?

77 A. Well, I will say that cars of the type that were in this train—the train could have been stopped more quickly than the engine alone could have been stopped. The engine ordinarily brakes at about seventy-five per cent of its total weight, while cars of the Pullman weight never brake at less than ninety per cent of their total weight; therefore, with the Westinghouse brake, with which this was equipped, a train in this instance could have been stopped more quickly than the engine could, at the same speed. I would say, beyond a doubt, that we could figure, even without the aid of sand on the rail, to have stopped a train of this size within fifty feet, in every instance, at a speed of twelve miles an hour.

Cross-examination.

By Mr. Allen:

Q. When did you make the test of that light, that you speak of?

A. We made the test on the night of March 13th, at about 8 P. M.

Q. This year?

A. Yes, sir.

Q. For what purpose were you making those tests?

A. To get definite information in connection with the information I am giving now—to know exactly what I could say in connection with it, if asked that definite question.

Q. In other words, you were preparing for this case, at that time, were you?

A. Not exactly. We made headlight tests for general information on the road. This is not the first test we have made, of the headlight service, but it was verified by the tests we had made previously.

Q. Your company is doing away with the oil lamp, is it not, and adopting the electric light, for its headlights?

A. No, sir, it is not.

Q. Is it not a fact that you are now using a great many more electric headlights than you used to?

A. No, sir, we are not equipping any freight cars with electric lights, at all; but in the passenger service, their line service is already equipped with the electric; but the local and branch line service is not equipped with electric lights, and I think it likely they will not be.

78 Q. Is it not a fact that one lamp burning oil—a lamp of the same type burning oil, is liable to give less light than another, similar lamp burning oil?

A. It is entirely possible that they would vary, yes, sir.

Q. Depending on the wick conditions, and the quality of the oil?

A. Well, of course the quality of oil would come into play, but it is the same type of oil, or same class of oil used all the time on our road, so we would not have trouble of that kind; it would be the general condition of the lamp and reflector; but not of the oil.

Q. Do you test all the oil you buy?

A. We do not make a chemical analysis of it, no, sir.

Q. You just depend upon the oil companies to give you what you order?

A. Yes, sir.

Q. I notice recently they have been having some trouble along that line—for selling gasoline mixed with coal oil. It is true then that the light you used in making this experiment was of course in good condition, was it not?

A. It was a light right along in service—no special arrangement made about it; nothing was said to the shop people or crews about a test; we simply took the light as it was in service, without making any special provision, at all.

Q. You saw, though, that that light was in good condition before you made the test, did you not?

A. It was in good condition, but no examination was made until we went out in the yard to make the test.

Q. Didn't you look at it to see if it was in good condition, before you made the test?

A. I looked at it, and saw it was in good condition.

Q. In first class condition, was it not?

A. I won't say first class condition, but in average condition; we aim to keep them all in good condition.

Q. I understand that; but it is impossible to do that having them expressed around the country as you do. Is it not a fact that an oil lamp on an engine may start out in good condition, and before it goes very far it will be in very bad condition, from smoking, or some defective burning, combustion, or something of that sort?

A. I think that is barely possible; I think that is certainly an exception, rather than a rule. We feel that the oil light is less liable to failure than the electric light, because there are less complications.

79 Q. You feel that they are more certain to give some sort of a light, than the electric light?

A. Yes, sir; I think the percentage of failures, with the oil lamp, is below what you would expect of the electric equipment.

Q. That is, a total failure?

A. Yes.

Q. Where was that experiment made?

A. It was made on the tracks west of Richmond, within the yard limits there—but up on the track outside of the city lights.

Q. What hour of the night was it?

A. I previously stated that it was about 8 P. M.

Q. Do you know anything about where this light came from, that was used on that engine that night—199?

A. I can not say definitely from which manufacturer it came from, but we get lights made by different manufacturers, of a standard design, and it doesn't matter from which concern they come, they are exactly the same candle power, and exactly the same design and shape, so that would not come in play.

Q. My question had reference to the immediate use of the light before it started out with 97 that night?

A. I do not understand your question, sir.

Q. Do you know whether that lamp had been in use that night, or immediately before they started with it on 97?

A. Well, I could not say that I remember distinctly about that case, but I know that was a branch line passenger engine, and no changes, as I recollect, were made in the light. I could not take oath to that, but I am satisfied I would be safe when I say there was no change made on it, because a branch line passenger engine enters the terminal only on one trip, and it went out with that equipment that night going west.

Q. Where would it come in from the branch line?

A. It came from the Lexington Branch.

Q. The James River Branch?

A. Yes, sir.

Q. And it came around and took 97 out that night?

A. I don't know what time the equipment left, or how long that remained there at the terminal, but it was probably the same day.

Q. Why didn't you make the test with that lamp?

80 A. Because that lamp was not available to me.

Q. What had become of it?

A. I am unable to say what became of the lamp.

Q. Have you seen it since the collision?

A. I have never seen the oil burning portion of it, that I recollect.

Q. Since then?

A. I do not recall that I have. I never paid any attention to that feature, because it developed at the time that there was no defect in the light; there was no question raised about it, and we did not preserve any particular portion of that any more than other parts of the engine.

Q. There was no question raised about the headlight?

A. No, sir, there was not.

Q. Do you know why your company raises any question now?
A. I can not tell you that.
Q. What became of engine 199?
A. She has never been repaired; she is on the Richmond yards now, never has been overhauled since the accident.
Q. Is it not a fact that she is in the scrap pile there?
A. No, sir, she is not.
Q. She is standing on the side-tracks?
A. She is on the yard somewhere; I can not tell you exactly where she is; but she has not been overhauled.
Q. She is under your charge, is she not?
A. If she were overhauled she would be turned over to me for repairs.
Q. If it could be overhauled it would be turned over to you, but if it could not be overhauled it would not be turned over to your charge?
A. All engines turned over to the shop for repairs; but engines of this type have not been repaired; except those assigned to work. Another engine of this type was put in the place of this one, and that being a light engine it has not been overhauled yet,—like a good number of others of the same class.
Q. So it is at present not under your supervision?
A. I will say this, that it is under my supervision to the extent others that are awaiting overhauling, are.
Q. I understood you to say that none of those were under your supervision unless they were put in for repairs again?
A. If you have that idea, I did not mean that. Of course
81 all power in the territory comes under the supervision of the Master Mechanic, so far as maintenance and things of that kind; but power of this kind is not being overhauled, as I stated, except when needed for certain service.
Q. Then is that under your supervision, or under some other department of the road?
A. It would come under the Motive Power Department—directly under the Superintendent of Motive Power, and by his instructions when power of that kind is to be taken through it will have attention in the way of repairs like the rest.
Q. You are Division Master Mechanic; would it not come under your control?
A. It would not come under my power to take it into the shops, as I said just now, with the present instructions; that is, we have instructions not to overhaul power of that type, except when it is needed for certain service; and an engine from another point was put in the place of this one, and this one has not been overhauled yet.
Q. Although it has been more than a year since this collision, the Company has not thought it necessary to fix that for its use?
A. Not as yet; and we have others of the same type that have been waiting the same time, or longer, for repairs, that have not even been damaged.

By Mr. Haw:

Q. Where did you say this experiment with the light was made?
A. On the C. & O. tracks west of Richmond; it was in the yard limits, but out beyond the city lights.
Q. Ain't there street lamps and other lights near that?
A. No, sir.
Q. Is it on the main track or side line?
A. On the long siding away up west of the American Locomotive Works.
Q. West of the Locomotive Works?
A. Yes, sir.
Q. How near that?
A. Why, I would say a quarter of a mile west of there, right around the curve.
Q. Up there near Highland Park?
82 A. Not that far. You know the ravine as you go up the hill from the Locomotive Works—up towards the hill which is near Highland Park.
Q. What time did the moon rise that night?
A. I couldn't tell you.
Q. Did it rise about 8 o'clock?
A. There was no moon when we made the test.
Q. You said it was 8 o'clock, did you not?
A. It was 8 o'clock, and there was no moon, either.
Q. There are some beautiful nights in March, sometimes?
A. Yes, sir, but there was no moon that night.

By Mr. Allen:

Q. What kind of an engine did you make the stopping test with?
A. The stopping test was made with a six-wheel switcher.
Q. Is that a similar type of engine to this one we have been talking about—199?
A. It is not a similar type of engine, but the percentage of weight brake is the same as it is on the type we have been talking about, or a little bit—practically the same.
Q. Was that a yard engine you were testing?
A. It was a yard engine, yes, sir.
Q. A different type of engine?
A. A different type of engine.

By Mr. Haw:

Q. Were the wheels the same height as the others?
A. Yes, sir, the same height.

By Mr. Allen:

Q. Did you make that test on March 13th, 1914, too?
A. Yes, sir.
Q. Was that made with reference to this case?
A. We just made it as a matter of information, thinking it might be needed in this case. Mr. Leake and Mr. Dunn, both, wanted to

know just exactly what distance it would take, and the demonstration was made more for their personal benefit than thinking it would be needed here.

Q. It was for Mr. Leake and Mr. Dunn—for their amusement, I suppose,—a few days before this case was going to be tried?

83 A. I don't think it was any more than reasonable that they should want to know it.

Mr. Allen: Well, that is perhaps true.

(Witness here stood aside.)

J. W. BEASLEY, duly sworn on behalf of Defendant, testified as follows:

By Mr. Carter:

Q. Mr. Beasley, where were you born and raised?

A. I was born in Spotsylvania.

Q. How long had you been in the employment of the C. & O., at Doswell, when this accident occurred by which this gentleman here lost his leg?

A. Twelve years.

Q. What was your duty at the office that night?

A. Telegraph operator.

Q. You were in the tower?

A. Yes, sir.

Q. Did you know that night that there was standing on the main track of the Chesapeake & Ohio some detached freight cars—coal cars, I think—when the train was ordered forward?

A. No, sir.

Q. Captain Shisler says that he had told you these cars were there, and that you must turn in this train on which this gentleman was hurt, on the branch line, on the north switch, and send it through that way.

A. No, sir.

Q. Is that a mistake?

A. That is a mistake; I never heard it; if he told me I never heard it.

Q. Now you were there in the tower, and you turned on a white light to let it go through?

A. Yes, sir.

Q. Where did you understand those cars were—if there were any cars up there on the track?

A. I didn't know there were any cars up there, at all.

Q. Well, what did Captain Shisler say to you, or what did

84 *to go there* you say to him, that night just before this accident, do you remember?

A. My instructions were, when I come to work, from the second trick operator, before I ever seen Captain Shisler, that Extra 596 was at the west and shifting, and that I was to hold No. 97, or any westbound train, at the home block signal, until I heard from Captain Shisler—that he didn't know where he would have his train. Soon

after that Captain Shisler came in the office and asked me about turning his engine; he wanted to head it back east, and I told him that the switches were working very bad, that it was hanging, and that was a very hard move to make when the switches were working in the condition they were, although I would try. So I started to turn his engine. In the meantime No. 97 pulled up to the station—the home block signal—and stopped; I had the switches all against him; the de-rail was open, and the signal was setting red. It had been standing there a minute or so, and I called Captain Shisler's attention to it, told him I was holding 97 down there, and his reply was, "All right"; and in a few minutes after that I called his attention to it again, said, "Captain, there is 97 down here," and I didn't hear him make me any reply; he was there at the table; he leaned over against the table figuring out his tonnage, or working in some way or another on some bills, and when he got ready to go he picked up his lamp, and said, "All right, you can let 97 over," and I walked with him on to the door, and I said, "All right, let 97 on over?" He said, "Yes, let 97 on by; I am going to see if all the switches are lined up; I don't want to run through any switch." So I immediately changed everything from the R. F. & P., and set them up to the C. & O., and gave 97 the white signal to proceed.

Q. How about that colored man who was in the office that night, that was turning switches?

A. This colored man, he helped me pull a lever—No. 25 lever—No. 26 lever; No. 25 is the switch, No. 26 is the locker to it; this locker was hanging, and we had to throw down 25 and pull it backwards and forwards three or four times—jerk it—before we could get it to close, and I had a sore thumb at the time, and I called on this negro to help me handle that switch. This negro doesn't know one switch from another.

Q. Whatever he did was helping you?

A. Helping me.

85 Q. Helping you pull the switch?

A. Yes; I had my hands on the switch with him.

Cross-examination.

By Mr. Allen:

Q. The C. & O. Company discharged you for letting 97 through that night, didn't it?

A. Yes, sir.

Q. Do you remember Mr. Blue being in there too, when Captain Shisler was in there?

A. Yes, sir; Mr. Blue—I remember him coming up in there for about two minutes.

Q. Now Mr. Blue and Captain Shisler have both testified that he told you to let 97 in on the passing siding, and that he would go on west and throw that switch. I say both of them have testified to that?

A. Yes, sir.

Q. Do you still say they are mistaken about it?
A. I certainly do.
Q. You stated awhile ago that you did not hear that?
A. I did not hear it, no, sir.
Q. They might have said it, and you might not have heard it?
A. If they said it I didn't hear it, no, sir.

By Mr. Haw:

Q. When you speak of changing the lights—do you do anything more than change the lights? Don't you throw the switches?
A. Yes, sir, throw the switches.
Q. So you are the man who opens the switches that were closed before, and threw the light, showing that it could get through clear?
A. Well, these switches were open when 97 pulled up to the station. These de-rails were open right beyond the signals, and I had to close those de-rails before I could pull the signal white.
Q. You did all that, so they would have a clear run?
A. Yes, sir.

(The witness here stood aside.)

86 The Defendant rests.
The testimony ends.

And this being all the evidence in the cause, the jury (after having been instructed by the court, the instructions to the jury both oral and written being set out in full in Bill of Exceptions No. 3, filed herewith) retired to their room to consider of their verdict and after a time returned into Court with the following verdict, to-wit:

"We, the jury find for the plaintiff and fix the damages at $25,000.00."

J. S. PRIDDY, *Foreman.*

Thereupon the defendant by counsel, moved the Court to set aside the verdict of the jury and award it a new trial upon the following grounds: (1) The verdict was contrary to the law and the evidence. (2) The misdirection of the jury by the court in its instructions. (3) The damages were excessive; and (4) The jury was not summoned, selected, formed and constituted in accordance with Article VII of the amendments of the Constitution of the United States and the laws passed in pursuance thereof. But the court overruled said motion and declined to set aside the said verdict and award the defendant a new trial; to which ruling of the court the defendant, by counsel, excepted, and tenders this its Bill of Exceptions No. 2, and prays that it may be signed, sealed and made a part of the record in this case and the same is done accordingly on this 16th day of April, 1914, and within the time prescribed by law.

R. H. L. CHICHESTER. [SEAL.]

Bill of Exceptions No. 3.

Be it remembered that on the trial of this cause and after the jury had been duly sworn to try the issue joined and after all the evidence

had been introduced both for the plaintiff and for the defendant, which said evidence is set out in full in defendant's bill of exceptions No. 2, filed herewith, the plaintiff, by counsel moved the Court to give the following instructions to the jury, numbered re-
87 spectively I, II, III, and IV; which are in the words and figures following, to-wit:

I.

The Court instructs the jury that the plaintiff was at the time of the injury complained of, engaged in interstate commerce, and his rights and the liability of the defendant are governed by the Employers' Liability Act, so called, and they shall disregard the third and fourth counts of the plaintiff's declaration.

II.

The Court instructs the jury that if they believe from the preponderance of the evidence that the defendant's employees were charged with duties as alleged in the plaintiff's declaration and failed to perform such duties and that such failure was the proximate cause of the plaintiff's injury in whole or in part then the defendant is liable to the plaintiff.

III.

The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant they may take in consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, assessing such damages, not however in excess of $35,000.00 as to them may seem just and fair.

IV.

The Court instructs the jury that all the instructions given, are to be read and considered together in the light of all evidence in the case.

To the giving of the said instructions numbered respectively, II, and III, any or either of them, the defendant by counsel objected, but the court overruled said objections and gave all the said instructions to the jury, to which action of the court in giving instructions numbered respectively II and III, any or either of them, over the objections of the defendant, the defendant by counsel excepted.

88 And the said defendant by counsel, thereupon moved the court to give to the jury the following instructions, marked respectively (*a*), (*b*), (*c*) and (*d*), which are in the words and figures following, to-wit:

(*a*)

The Court instructs the jury that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injury he received was the direct and proximate result of the negligence of the defendant.

(*b*)

Should the jury believe from the preponderance of the evidence that the plaintiff was negligent and that such negligence contributed to the accident which caused the plaintiff's injury, even if they find that the defendant company is liable, they should reduce the amount of damages to which they think his injury entitles him in the proportion which his negligence may bear to the combined negligence of himself and the defendant.

(*c*)

The court instructs the jury that in estimating the damages to which the plaintiff may be entitled, if they think he is entitled to any, they cannot consider the chance of his increased earnings by reason of promotion.

(*d*)

The jury should not take into consideration the prospects of increased earnings by the plaintiff, if he had not been hurt, hereafter to be made by him.

The court thereupon gave the instructions marked respectively (*a*) and (*b*) as asked for by the defendant, but refused to give the instructions marked respectively, (*c*) and (*d*) asked for by the defendant, any or either of them, but in the course of argument of counsel for the plaintiff the Judge cautioned counsel when discussing the plaintiff's damages that there was no evidence in the record of the plaintiff's prospects of promotion and orally instructed the jury that they should not take into consideration any probable promotion which might come to the plaintiff or any probable increase in the earnings capacity of the plaintiff.

89 To the action of the court in declining to give instructions marked (*c*) and (*d*) respectively, asked for by the defendant, the defendant, by counsel, excepted.

And the instructions set forth herein are all the instructions asked for by either party and the instructions set forth above as having been given by the Court, are all the instructions, either oral or written, given by the court to the jury in this cause.

The defendant by counsel thereupon tenders this its bill of exceptions No. 3, and prays that it may be signed, sealed and made a part of the record in this cause, and the same is accordingly done on this 16th day of April, 1914, and within the time prescribed by law.

R. H. L. CHICHESTER. [SEAL.]

STATE OF VIRGINIA,
County of Hanover, To wit:

I, C. W. Taylor, Clerk of the Circuit Court of Hanover County, in the State of Virginia, do hereby certify that the foregoing is a true transcript of so much of the record and judicial proceedings of said Court in an action of Trespass on the Case, lately pending therein, as I have been directed to copy. And I further certify that the said defendants have filed a written notice to the plaintiff of its intention to apply for such transcript of said record, which notice was duly accepted by Allen & Walsh, Attorneys for the Plaintiff.

Given under my hand this 24th day of April, 1914.

C. W. TAYLOR, *Clerk.*

Fee for copy of record $20.00.

In the Supreme Court of Appeals of Virginia.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
v.
ASA P. CARNAHAN, Defendant in Error.

It is hereby stipulated by counsel for Plaintiff in Error, and by Counsel for Defendant in Error, that the error in the tran-
90 script of the record, filed with the petition for a writ of error in this cause, in that said transcript of the record omitted the ground of demurrer insisted upon at the hearing of this cause, may be corrected by the insertion of said ground as attached to this stipulation. And it is further stipulated that said ground of demurrer, as attached to this stipulation, shall be treated in all respects as if brought to this court on writ of certiorari, or other proceedings for the correction of the record in the respect aforesaid.

Dated June 18, 1914.

D. H. & WALTER LEAKE,
Counsel for Chesapeake & Ohio Railway Company.
ALLEN & WALSH,
Counsel for Asa P. Carnahan.

VIRGINIA:

In the Circuit Court of Hanover County.

ASA P. CARNAHAN
v.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Demurrer to Declaration and Ground Thereof.

The said defendant demurs to the declaration in this case and each count thereof, and for cause of demurrer says:

That the same is not sufficient in law.

And the said defendant sets forth the following as its Ground of Demurrer:

1. The said declaration combines an alleged cause of action under the laws of the State of Virginia with an alleged cause of action under the Employers' Liability Act of the Congress of the United States, approved April 22nd, 1908.

A Copy—Teste:

H. STEWART JONES, *C. C.*

91 & 92 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Wednesday, the 20th Day of January, 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
against
ASA P. CARNAHAN, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of Hanover County on the 25th Day of March, 1914.

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel; but, because the court here is not yet advised of its judgment to be given in the premises time is taken to consider thereof.

A copy.

Teste:

H. STEWART JONES, *C. C.*

93 CHESAPEAKE AND OHIO RAILWAY COMPANY
v.
ASA P. CARNAHAN.

Opinion by Judge R. H. Cardwell.

RICHMOND, VA., November 11, 1915.

Circuit Court of Hanover County.

This action was brought by the defendant in error, Asa P. Carnahan, against the plaintiff in error, The Chesapeake and Ohio Railway Company, to recover damages for personal injuries imputed to the negligence of the defendant. At the trial there was a verdict and judgment for the plaintiff for $25,000 damages, and to that judgment this writ of error was awarded.

The plaintiff was, and had been for some years prior to his injury, an employee of the defendant as fireman on both freight and passenger trains, and on the date of his injury, March 7, 1913, was in the line of his duty on one of defendant's trains which left Richmond, Va., at 12:40 a. m., west-bound, the train, besides the engine and

tender, consisting of seven empty tourist sleepers, being moved "dead-head" (i. e., without passengers or freight) from Richmond, Va., and destined to points without this State. Upon the arrival of the train at Doswell about two o'clock a. m., and as it approached
94 that station, before crossing the tracks of the R. F. & P. R. R. Co. at that point, it stopped on signal given by telegraph operator J. W. Beasley in the tower of Doswell, the signal being given on account of there being then a series or "cut" of fifteen or sixteen empty cars, coupled together, standing on the main track a short distance west of Doswell, just west of a county road crossing, which were being collected into a special train in charge of Conductor J. R. Shisler to be brought east to Richmond. This "cut" of empty cars had just been placed by Conductor Shisler on the main track, with the caboose on the west end of them, and no lights of any sort on the east end—that is, facing the direction from which the train that plaintiff was firing approached; nor was there a flagman placed there to protect said "cut" of cars or to give warning of an approaching train, the engine that had placed them on the main track being then on a side track nearer to the station—Doswell.

After delaying plaintiff's train, west-bound, some six or seven minutes at the point where it had been stopped on signal, a signal was given it by Operator Beasley, from the tower or telegraph office, to proceed, meaning that the main track was clear, and the train proceeding ran into the east end of said "cut" of cars that had been left standing on the main track, as stated.

95 In the collision, the plaintiff was caught, from his knee of his right leg down, between the tank on the tender and the boiler head in the cab of his engine, and remained pinned in that position for forty-five or fifty minutes before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for these injuries and his consequent sufferings that he sues to recover damages.

The declaration contains four counts. The first two counts charge that plaintiff and defendant were engaged in interstate commerce, thus alleging a cause of action under the Employers' Liability Act of Congress. One of these was based upon the alleged negligence of Operator Beasley, and the other upon the alleged negligence of the train crew of the train standing at Doswell under Conductor Shisler's charge. The other two counts were based upon the same grounds of negligence, save that they omitted any allegation as to the parties being engaged in interstate commerce, thus alleging a cause of action under the law of this State. There was a demurrer to the declaration upon the ground that it was improper to combine in one suit a cause of action under the Employers' Liability Act of Congress and the State law, which demurrer was overruled, and this ruling is made the basis of defendant's first assignment of error, but in the oral argument of the case before this court the assignment was waived.

The case was tried by a jury of seven, in accordance with the provisions of section 3166 of the Code of 1904. It was regularly summoned under the State laws and consisted of nine veniremen, which,

after the plaintiff and defendant had each stricken off one venireman, left the jury of seven who tried the case. Before the jury,
96 however, had been examined on their voir dire, and before any members of the panel had been stricken off by either party, the defendant challenged the array of jurors and moved the court to quash the venire facias, upon the grounds that the jury was not summoned, selected, formed and constituted as required by Art. 7 of the Amendments to the Constitution of the United States, which is as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The motion to quash the venire was overruled and this ruling is made the basis of the defendant's second assignment of error here, the contention being that the rights asserted in this suit are Federal rights, created by the Congress of the United States, and can only be tried by the common law jury of twelve, required by the seventh Amendment to the Constitution, supra, since the jury referred to in this amendment is the common law jury of twelve.

This contention is without merit. Section 6 of the Employers' Liability Act, as amended by the act of April 10, 1910, expressly provides that the Federal courts shall have concurrent jurisdiction
97 with the State courts of cases arising under the act, and that no case brought in a State court shall be removed to a Federal court. How else is a State court to exercise its jurisdiction in such a case except according to the procedure provided for in its own statutes? The statutes of this State make no provision for a trial in civil cases by a jury of twelve, except for some special reason when a special jury may be summoned under section 3158 of the Code, and the allowance or refusal of a special jury is a matter resting in the sound discretion of the court. A. & D. R. Co. v. Peake, 87 Va. 130, 12 S. E. 348.

Upon reason and authority it is not essential to the enforcement of a right created by a Federal law that provisions of the Federal Constitution regarding the administration of the federal law be followed. The enforcement of a Federal right, as it seems to us from the authorities, does not differ from the enforcement of rights created by other sovereignties than the United States, in that it draws with it the necessity of enforcement in the manner prescribed by the Federal Constitution for the administration of justice.

It is well said by the learned counsel for the plaintiff in this case: "Rights created by the Congress of the United States become
98 a subject of litigation between parties and are enforced as a basis of liability in the same manner as are other rights subsisting between litigants. The United States is a sovereign possessing all the attributes of sovereignty, though exercising its sovereignty over a limited subject matter. One of the attributes of sovereignty is the authority to create rights and obligations between persons amenable to its jurisdiction. Those rights once created in no way differ from

rights created by any other sovereignty. It is true that owing to the peculiar relation between the National and State governments the national and federal government may exclude the State courts from the exercise of jurisdiction over Federal rights, but in the absence of such restriction, Federal rights are enforcible in any court having jurisdiction of the parties."

The relation of the State courts to rights created by the Congress of the United States is very clearly explained in the Federalist, No. 82, page 608, as follows: "I mean not, therefore, to contend that the United States in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the Federal courts, solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, fur-
99 ther than may relate to an appeal; and I am of opinion that in every case in which they were not expressly excluded by the future actions of the national legislature, they will, of course, take cognizance of the cause to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, although the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan not less than those of New York may furnish the objects of legal discussion to our courts. When in addition to this we consider the state government and the national government as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it is not expressly prohibited."

In the Second Employers' Liability Cases—Mondou v. N. Y. N. H. & H. Ry. Co.—223 U. S. 1, 56 L. Ed. 327, the court in reviewing the action of the State court of Connecticut in refusing to enforce the act because not in harmony with the policy of that State, said:
100 "Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts, or to control or affect their modes of procedure, not only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,' because we are advised by the decisions of the Supreme Court of Errors that the superior courts of the State are courts of general jurisdiction, are empowered to take

cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recov-
101 ery, as where the causal negligence was that of a fellow servant. * * * We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

The court in Claflin v. Housman, 93 U. S. (3 Otto) 130, 23 L. Ed. 833, 838, defines the relation of the State courts to Federal laws as follows: "It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of Ableman v. Booth, 21 How. 506 (62 U. S. xvi, 169): and hence the State courts have no power to revise the action of the Federal courts, nor the Federal, the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

In that case the opinion by Mr. Justice Bradley reviews
102 and commends the views presented by Alexander Hamilton in No. 82 of the Federalist, supra, and this is said: "These views seem to have been shared by the first Congress in drawing up the Judiciary Act of September 24, 1789, 1 Stat. at L. 73; for, in distributing among the various courts created by that act, there is a constant exercise of the authority to include or exclude the State courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the State courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases."

As we read the Constitution of the United States, in the light of judicial interpretations thereof, as originally adopted, there is nothing which by any possibility could be construed as an inhibition on the State courts, or as prescribing the procedure to be adopted in enforcing Federal rights. The 7th Amendment was proposed to the legislatures of the several States by an act of Congress passed at the first Congress, September 25, 1789, which was the day following the passage of the Judiciary Act, creating Federal tribunals inferior to the Supreme Court, and this act of September 24, 1789, first
103 created courts having jurisdiction for the enforcement of Federal laws. Until then they were enforcible only in the State courts. Thereupon, on the next day, the act subsequently embodied in the first ten amendments was passed, and we agree with the contention of counsel for the plaintiff in this case that this is a significant fact in determining the application of the 7th Amendment to

State courts, whether they are taking cognizance of Federal or State laws, for it necessarily requires the inference that it was made necessary by the creation of Federal trial courts, and applies to them only. This view is clearly borne out by the following decided cases: Barron v. Baltimore, 7 Pet. 248, 8 L. Ed. 672; Edwards v. Elliott, 21 Wall. 557, 22 L. Ed. —; Walker v. Savinet, 92 U. S. (2 Otto) 90, 23 L. Ed. 678; Brown v. New Jersey, 175 U. S. 172, 44 L. Ed. 119; Maxwell v. Dow, 175 U. S. 581, 44 L. Ed. 597.

We deem it necessary to quote from only two of these cases.

In Walker v. Savinet, supra, the court speaking of an act of the State of Louisiana, permitting a judge to enter a judgment without a verdict in case a jury failed to agree, said: "This (7th Amendment), as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliott, 21 Wall. 557. The
104 States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the 14th Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. Murry v. Hoboken etc. Co., 18 How. 280, 15 L. Ed. 276. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States, Art. VI, Constitution. Here the State court has decided that the proceedings below were in accordance with the law of the State, and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

105 In Brown v. New Jersey, supra, there was called in question the constitutionality of the law of New Jersey providing for a "struck" jury in felony cases, and the opinion by Mr. Justice Brewer, citing many authorities, said: "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government. * * * The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations hereinbefore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

These authorities, we think, fully answer the further contention

of the learned counsel for the defendant in this case, that the 14th Amendment to the Constitution of the United States has operated to enlarge the scope of the 7th Amendment, thereby rendering the 7th Amendment a privilege under the 14th Amendment.

106 It is inconceivable that the Supreme Court in the Second Employers' Liability Cases, supra, in holding that the right of the State courts of general jurisdiction to enforce a right under this law created an implication of duty to enforce it, intended that this ruling should be restricted to courts of States providing a jury of twelve. Federal rights are recognized and enforced in the State courts, as are any other rights which are the basis of a litigation, whether arising out of State or foreign law. The Constitution of the United States contains no prohibition to the enforcement of those rights in the State courts, in accordance with their established mode of procedure, and the 7th Amendment is a limitation on the administration of law in the Federal courts, not a limitation on the conduct of litigation, on whatever rights based, in the State courts.

The next assignment of error calls in question the correctness of the following instruction given for the plaintiff over the objection of the defendant: "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sus-

107 tained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not, however, in excess of $35,000.00, as to them may seem just and fair."

The objection to this instruction is first directed to the use of the words therein, "its effect upon his future," the contention of the defendant bein*f*, in effect, that this language was entirely too broad and allowed the jury to take into consideration things which might be in their nature essentially speculative and remote, and for which there could be no recovery in damages; that is, the jury might have considered the possibility of the plaintiff's promotion and speculative profits from collateral undertakings upon which he might have embarked but for the injury, both of which have been condemned as improper elements of damage in such cases; and, second, the contention is that the instruction directs the attention of the jury to the sum of $35,000.00 without qualifying it with the statement that the sum was mentioned merely because it was the maximum amount claimed in the declaration.

To sustain the first objection to the instruction, we would have to reach the conclusion that the jury could have not only taken into consideration matters which were not in evidence, but matters

108 which they were expressly instructed not to consider. The record shows that the trial court was careful to exclude, upon defendant's objection, all evidence of possibility or probability of plaintiff's promotion, and of his possible or probable increased earnings; and it also appears in the record that the presiding judge "cautioned counsel when discussing the plaintiff's damage that there was no evidence in the record of the plaintiff's prospects of promo-

tion, and orally instructed the jury that they should not take into consideration any probable promotion which might come to the plaintiff or any probable increase in the earning capacity of the plaintiff."

It is true that this instruction was not in writing, but as there was no evidence in the record of matters remote or speculative, no evidence of prospects of promotion or increased earnings, however broad the language of the instruction under consideration, this court cannot assume that the jury disregarded the instructions of the trial court and rested their verdict upon matters remote and speculative, and not upon a consideration of the evidence in the case.

In R. & D. Ry. Co. v. Elliott, 149 U. S. 267, 37 L. Ed. 728, cited for the defendant in this case, it was said, that the particular losses the plaintiff sustained, or his possible promotion, could not
109 be considered, but what the future holds out for such a one, in general, was, of course, to be considered. See also, Wash. & Georgetown Ry. Co. v. Harmon's Admr., 147 U. S. 571, 37 L. Ed. 284, where the court held that an instruction permitting an award of damages for future effects of the plaintiff's injury, such as suffering of mind and body, personal inconvenience, and the loss of time he would suffer in the future, was not objectionable.

This court in Richmond & Danville R. Co. v. Norment, 84 Va. 167, approved an instruction which told the jury they should take into consideration "proper compensation for his (plaintiff's) being deprived by the said injuries from following such calling or business as he could have followed but for said injuries," the opinion of the court saying that the instruction was plainly proper and upheld by reason and authority.

Likewise the court, in Ches. & O. Ry. Co. v. Hoffman, 109 Va. 44, 2 Va. App. 766, in an opinion by Keith, P., approved an instruction, "that the amount of damages should compensate the plaintiff for the loss of money which he would probably earn had not the injuries occurred:" provided, of course, that the injuries received were the result of the negligence of the defendant company.
110 The instructions here complained of required the jury to take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effects upon his future. We do not think that the instruction is susceptible of the construction contended for, that it permitted the jury to take into consideration "possible future physical effects from the injury such as future suffering which in the absence of evidence as to the probability of such future suffering was improper." It would be a constrained construction of the language of the instruction, "its effects upon his future," to hold that it refers to future suffering, and that damages not the proximate result of plaintiff's injuries could have been included under the instruction. Not only so, the instruction enumerated accurately the elements of damages that the jury were to take into consideration, and at the instance of the defendant the court instructed them "that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that

the injuries he sustained were the direct and proximate result of the negligence of the defendant."

In Norfolk Southern R. Co. v. Tomlinson, 116 Va. 153, 9
111 Va. App. 93, a case of a similar character to this, the court considered an instruction relating to the measure of damages which told the jury that in assessing damages they might take into consideration "such damages as will naturally, reasonably and probably result to him (the plaintiff) in the future as consequences of his injuries," without confining them to the evidence before them, and in the opinion by Buchanan, J., it was said: "It would have been better to have told the jury that future damages, like all other damages allowed, must be ascertained from the evidence before them; but when the instruction as a whole is considered, we do not think that the jury could have thought they had the right to fix the future damages by mere conjecture instead of by the evidence before them."

So, in the case here, the instruction under consideration, when considered as a whole, especially when considered along with all the other instructions given in the case, the jury could not have, as it seems to us, thought they had the right to fix the future damages of the plaintiff by mere conjecture instead of by the evidence before them. See also Richmond F. & P. Co. v. Robinson, 100 Va. 394; Norfolk Ry. Co. v. Spratley, 103 Va. 379; Daingerfield v. Thompson, 33 Gratt. (74 Va.) 136.

112 With respect to the other objection to the instruction, viz: that it mentions the sum of $35,000.00 whereby the jury were misled, we deem it only necessary to say that it is not to be presumed from the amount of damages assessed to the plaintiff that the jury were misled by the mere mention of the sum claimed as damages in his declaration, since the court had defined the elements entering into the ascertainment of damages and expressly told the jury that such damages as they allowed should "seem to them just and fair." The instruction conforms to the suggestion made by this court with respect to an instruction complained of in Newport News Pub. Co. v. Beaumeister, 104 Va. 744, where the jury were told, "but damages may not exceed $10,000.00 the amount claimed in the declaration," omitting the limitation that the damages assessed by the jury should be such as they deemed just and fair.

There was no error in refusing defendant's instructions "C" and "D," telling the jury that they should not take into consideration "chances of increased earnings by reason of promotion" and "prospects of increased earnings if he had not been hurt." We find no evidence in the record that would have justified the giving of those instructions, and where such is the case it is too well settled to require citation of authority that if there is no evidence on the
113 subject matter of an instruction it should not be given; nor was there given an instruction for the plaintiff broad enough to permit the jury to consider these elements of damage, as counsel for defendant contends. Not only so, but the court, during the argument of the case for the plaintiff, cautioned counsel that there was no evidence in the record of the plaintiff's prospects of promotion and orally instructed the jury that they should not take into

consideration any probable promotion which might have come to the plaintiff or any probable increase in the earning capacity of the plaintiff. In these circumstances the defendant could not possibly have been prejudiced by the refusal of its instructions "C" and "D."

The remaining assignment of error is to the refusal of the court to set aside the verdict and award the defendant a new trial, because contrary to the law and the evidence, and because of excessive damages assessed to the plaintiff.

We have already seen that there was no error in the rulings of the trial court in instructing the jury as to the law of the case, and the evidence to which we have adverted very clearly shows, as we view it, that the jury's finding could not have been other than in favor of the plaintiff, and that the record is free from any vital
114 error affecting his right to recover. There is nothing whatever in the record indicating that the jury, in ascertaining the damages, acted under the impulse of an improper motive, gross error, or misconception of the subject. The damages assessed to the plaintiff amount to a large sum, it is true, and if we could usurp the functions of the jury, perhaps we might say that the amount should have been less; but this we have no right to do, nor can we say, upon the evidence before us, that the verdict is plainly excessive. The injuries sustained by the plaintiff were very severe, and the circumstances connected with the accident and his attendant sufferings were in the highest degree distressing; or, as he, after describing his situation as being caught from his knee down—jammed against the boiler-head for fifty minutes and his leg roasting—on being asked as to his suffering, said, "there is no way to get at that." Amputation of his leg above the knee, leaving a stump of about eight or ten inches, followed. To the time of the trial, one year after the injury, the wound had not entirely healed. He had attempted to use an artificial limb but found that impossible, and not only was he thus crippled, but his nervous system was affected so that at times he still suffered pain and could not
115 rest, all of which facts were in a quiet way related by the plaintiff to the jury, the stump of his leg exposed to them that the unhealed wound might be observed by the jurymen.

The plaintiff was at the time of his injury thirty-two years old, was in the best of health, a man of unusual physique, who could stand the severest sort of labor and perform the arduous duties of a fireman on an engine as well as and above the average man of his age. He had been in the employ of the defendant as a fireman six and one-half years, both in freight and passenger service, earning at the time of his injury about $100 per month, and after the injury and up to the trial of this case he had been unable to earn anything or do anything, as he had no other profession or trade than that he was pursuing when injured.

In view of these facts, this court does not consider that it would be justified in disturbing the verdict of the jury on the ground that the damages assessed to the plaintiff are excessive. See, Southern Ry. Co. v. Smith, 107 Va. 553, 1 Va. App. 556, and authorities

cited; Washington-Virginia Ry. Co. v. Bouknight, 113 Va. 696, 6 Va. App. 647; N. Ry. & L. Co. v. Spratley, 103 Va. 379; C. & O. Ry. Co. v. Swartz, 115 Va. 723, 8 Va. App. 393, 685.

116 Upon the whole case, we are of opinion that there is no error in the judgment of the circuit court, and, therefore, it is affirmed.

Affirmed.

A Copy.
Teste:
H. STEWART JONES, *C. C.*

117 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 11th Day of November, 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
against
ASA P. CARNAHAN, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of Hanover County on the 25th Day of March, 1914.

This day came again the parties, by counsel, and the Court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the same be affirmed and that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him expended about his defence herein.

Which is ordered to be certified to the said circuit court.

A copy.
Teste:
H. STEWART JONES, *C. C.*

118 Supreme Court of Appeals of the State of Virginia, at Richmond, Virginia.

I, H. Stewart Jones, Clerk of the said Court, do hereby certify that the writings annexed to this certificate are true copies of the original- on file and of record in my said office, and that said originals, together, constitute the record of the proceedings of said court in this case.

Witness my hand and the seal of the said Court, this the 26 day of November, 1915.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond, Va.

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 26 day of November, 1915.

JAMES KEITH, [SEAL.]
President.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said Court, this the 26 day of November, 1915.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond, Va.

119 Supreme Court of Appeals of Virginia, at Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation,
vs.
ASA P. CARNAHAN.

Assignment of Errors.

Comes now the said The Chesapeake and Ohio Railway Company, a corporation, (being the plaintiff in Error in the petition, herewith filed, for a writ of error from the Supreme Court of the United States) and makes and files this, its assignment of errors, and says that in the record, proceedings, decision and final judgment of the Supreme Court of Appeals of the State of Virginia, in the above-entitled case, there are manifest errors, in this towit:

The Supreme Court of Appeals of Virginia erred in affirming (and not reversing) the final judgment theretofore entered in this case by the Circuit Court of the County of Hanover, State of Virginia.

This action was instituted in the Circuit Court of the County of Hanover by Asa P. Carnahan against The Chesapeake and Ohio Railway Company, under the Act of Congress of April 22nd, 1908, known as the "Employers' Liability Act," and the trial of said action at law was had before a jury of seven men, selected and chosen under the laws of the State of Virginia, over the objection, seasonably made, of The Chesapeake and Ohio Railway Company. There was a verdict by the jury in favor of the plaintiff for $25,000.00 damages and final judgment rendered for said sum, which judg-

ment was affirmed, on a writ of error, by the Supreme Court of Appeals of Virginia.

The validity of the trial of the case by the jury, selected and chosen as aforesaid was denied and drawn in question, on
120 the ground that the said jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof, and there were objections made as to certain instructions given and refused by the Circuit Court of the County of Hanover, and a motion in arrest of judgment, and a motion to set aside the verdict of the jury and there was thereby drawn in question the construction of the Act of Congress of April 22nd, 1908, known as the "Employers' Liability Act" and certain other Acts of Congress.

The said errors are more particularly set forth as follows:

First. The Supreme Court of Appeals of Virginia erred in holding and deciding that the trial of this case was properly had before a jury of seven men, selected and chosen under the laws of the State of Virginia, and that the said The Chesapeake and Ohio Railway Company was not entitled to the trial of said action at law by a jury of twelve men, and in affirming (and not reversing) the ruling of the Circuit Court of the County of Hanover, in this regard.

The said The Chesapeake and Ohio Railway Company seasonably set up and claimed the right to have the case tried by and before a jury of twelve men, under and by virtue of the Constitution of the United States and the laws passed in pursuance thereof, particularly the 7th Amendment to the Constitution of the United States, and the decision of the Supreme Court of Appeals of Virginia thus deprives the said The Chesapeake and Ohio Railway Company of rights, privileges and immunities, claimed under the Constitution of the United States.

Second. The Supreme Court of Appeals of Virginia erred in holding and deciding that the instruction designated as instruction "III," given to the jury by the Judge of the Circuit Court of the
121 County of Hanover, over the objection of the said The Chesapeake and Ohio Railway Company was proper and in affirming (and not reversing) the ruling of the said Circuit Court of the County of Hanover in this regard.

The said instruction was as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, as to them may seem just and fair."

This instruction is objectionable on the following grounds: (*a*) it allows a recovery in damages not only for the damages proximately resulting from the injury but also for "its effects upon his future," which involves a consideration of consequences which might

be essentially speculative and remote and for which there could be no recovery in damages and (*b*) it tells the jury the damages are not to be "in excess of $35,000.00, as to them may seem just and fair," thus pointing out and calling the attention of the jury to a certain sum which they might find as damages and giving judicial approval to that amount, and allows the jury to assess such damages, not exceeding that amount as to them might seem just and fair, without stating that the damages should be only such as were proven by the evidence.

Under the Act of Congress of April 22nd, 1908, known as the "Employers' Liability Act," a carrier is made "liable in damages" to a person suffering injury under certain conditions therein set forth, for such injuries.

The necessary implication from the language of the act is that the damages for which a defendant is liable are such as appear by the evidence to have proximately resulted from such injuries
122 and such damages as were recoverable for injuries of like character prior to the passage of the Act.

Furthermore the damages must necessarily be only such as were proven by the evidence as the Act of Congress does not permit a recovery for such a sum as to a jury "seem- just and fair."

In the giving of the instruction complained of over the objection of the said The Chesapeake and Ohio Railway Company it was deprived of a right, privilege and immunity claimed under a law of the United States.

Third. The Supreme Court of Appeals of Virginia erred in affirming (and not reversing) the ruling and judgment of the said Circuit Court of the County of Hanover, in overruling the motion of the said The Chesapeake and Ohio Railway Company seasonably made, to set aside the verdict of the jury and to award it a new trial on the following grounds: (*a*) the verdict was contrary to the law and the evidence; (*b*) the jury was misdirected by the Court in its instructions; (*c*) the damages were excessive, and (*d*) the jury was not summoned, selected, formed and constituted in accordance with Article VII, of the amendment- of the Constitution of the United States and the laws passed in pursuance thereof.

Wherefore for these and other manifest errors, The Chesapeake and Ohio Railway Company prays that the aforesaid judgment of the Supreme Court of Appeals of Virginia be reversed, set aside and held for naught; that said Railway Company be restored to all things it has lost by reason of the said judgment; that judgment be rendered in favor of said Railway Company, granting, upholding and enforcing its rights under the Constitution and laws of the United States; and the said Railway Company also prays for its costs, and for general relief.

123 DAVID H. LEAKE,
WALTER LEAKE,
Attorneys for The Chesapeake and Ohio Railway Company (Richmond, Virginia).

Filed with petition for writ of error:

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

124 To the Honorable Justices of the Supreme Court of the United States:

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,
vs.
ASA P. CARNAHAN, Defendant in Error.

Prayer for Reversal.

And now comes The Chesapeake and Ohio Railway Company, the Plaintiff in Error, and prays for a reversal of the judgment of the Supreme Court of Appeals of Virginia, in the action lately pending in the last-named court wherein your petitioner, The Chesapeake and Ohio Railway Company, was plaintiff (being designated as Plaintiff in Error in the last-named court) and Asa P. Carnahan was defendant (being designated as Defendant in Error in the last-named court) which judgment was entered by the last-named court on or about the 11th day of November, 1915, and your petitioner also prays for a reversal of the order and judgment entered in said action by the last-named court on or about the 11th day of November, 1915, affirming the order and judgment rendered in favor of Asa P. Carnahan against your petitioner, by the Circuit Court of the County of Hanover on the 25th day of March, 1914.

DAVID H. LEAKE,
WALTER LEAKE,
Attorneys for The Chesapeake and Ohio Railway Company (Richmond, Virginia).

125 Supreme Court of Appeals of Virginia, at Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
vs.
ASA P. CARNAHAN.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of Appeals of Virginia, the plaintiff, The Chesapeake and Ohio Railway Company (being designated as plaintiff in error in said Court) prays a writ or error from the said decision and judgment to the Supreme Court of the United States and files herewith its assignment of errors.

DAVID H. LEAKE,
WALTER LEAKE,
Attorneys for The Chesapeake and Ohio Railway Company (Richmond, Virginia).

STATE OF VIRGINIA,
Supreme Court of Appeals, ss:

Let the writ of error issue upon the execution of a bond by The Chesapeake and Ohio Railway Company, in the sum of thirty thousand dollars; said bond to act as a supersedeas.

Dated Nov. 19th, 1915.

JAMES KEITH,
President of the Supreme Court of
Supreme Court of *Appeals of Virginia.*

126 Supreme Court of the United States.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,
vs.
ASA P. CARNAHAN, Defendant in Error.

Bond.

Know all men by these presents: That we, The Chesapeake and Ohio Railway Company, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Asa P. Carnahan, in the sum of thirty thousand dollars, to be paid to the said Asa P. Carnahan, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

In verification whereof, The said The Chesapeake and Ohio Railway Company has caused these presents to be signed by Decatur Axtell, its Vice-President, thereunto lawfully authorized and its corporate seal to be hereunto affixed, and the said United States Fidelity and Guaranty Company has caused these presents to be signed by E. Leslie Spence, Jr., its Attorney in Fact, thereunto lawfully authorized; and its corporate seal to be hereunto affixed this 20 day of Nov., 1915.

Whereas, The above-named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Appeals of the State of Virginia.

Now therefore, The condition of the obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

127 [Seal Chesapeake & Ohio Railway Co., July 1, 1878.]
THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
(Signed) By DECATUR AXTELL, *Vice-President.*

Attest:
(Signed) MEADE SPICER, *Ass't Secretary.*

[Seal U. S. Fidelity & Guaranty Co.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By E. LESLIE SPENCE,
Attorney in Fact.

Signed, sealed and delivered in the presence of—
H. STEWART JONES.

The above bond is approved.
(Signed) JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] Original. Recei'd & filed Nov. 20th *day of Nov. 20,* 1915. H. Stewart Jones, Clerk.

128 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Appeals of the State of Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the *The* Chesapeake and Ohio Railway Company, Plaintiff in Error, and Asa P. Carnahan, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Chesapeake and Ohio Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
129 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at the City of Washington, District of Columbia, on Wednesday, the 29th day of December, 1915, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the

United States, the 20th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk United States District Court
for the Eastern District of Virginia,
By R. E. POWERS,
Deputy Clerk of said Court.

Allowed by
JAMES KEITH.

[Endorsed:] Received & filed Nov. 20, 1915. H. Stewart Jones, Clerk Supreme Court of Appeals.

130 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Asa P. Carnahan, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Virginia, wherein The Chesapeake and Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the President of the Supreme Court of Appeals of Virginia, this 20th day of November, 1915.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Attest:
H. STEWART JONES,
Clerk of the Supreme Court of
Appeals of Virginia.

Legal service of the above citation is hereby acknowledged this 23rd day of November, 1915.

C. W. ALLEN,
Attorney for Asa P. Carnahan.
N. W. WALSH,
Att'y for Asa P. Carnahan.

131 STATE OF VIRGINIA,
Supreme Court of Appeals, Richmond:

H. Stewart Jones, Clerk, Richmond, Va.

Nov. 27th, 1915.

Return to Writ.

UNITED STATES OF AMERICA.
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of the Supreme Court of Appeals of the State of Virginia, in the City of Richmond, this November 27, 1915.

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond.

Plaintiff in error's costs $57.29.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Teste:
H. STEWART JONES, *Clerk.*

Endorsed on cover: File No. 25,026. Virginia Supreme Court of Appeals. Term No. 743. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. Asa P. Carnahan. Filed December 8th, 1915. File No. 25,026.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 743.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

ASA P. CARNAHAN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error awarded to a judgment of the Supreme Court of Appeals of Virginia, affirming a judgment of the Circuit Court of Hanover county, Virginia, upon the verdict of a jury, for $25,000 damages, in an action at law under the Employers' Liability Act of Con-

gress of April 22, 1908 (35 St. at L. 65, Chap. 149) as amended by Act of April 5, 1910 (36 St. at L. 291).

SUMMARY OF THE EVIDENCE.

ASA P. CARNAHAN, hereinafter spoken of as the plaintiff, was a fireman in the employment of the THE CHESAPEAKE AND OHIO RAILWAY COMPANY, hereinafter spoken of as the defendant, and lost his leg as the result of a collision between a train of the defendant and certain cars belonging to the defendant situated on its track at Doswell, Virginia, on March 7, 1913.

The plaintiff was a fireman on train No. 97, Engine No. 199, in charge of Engineman E. L. Bailey and Conductor William McGraw, which left Richmond at 12:40 A. M., March 7, 1913, West bound. This train, besides the engine and tender, consisted of seven empty tourist sleepers, six of which were being moved "dead-head" (*i. e.*, without passengers or freight) from Richmond, Virginia, to Cincinnati, Ohio. The seventh tourist sleeper on this car was to be delivered to the Kanawha & Michigan Railway at Charleston, West Virginia.

It appears that an extra train of defendant known as Extra 596 West, in charge of Engineman M. E. Lane and Conductor J. B. Shisler had some time previously moved from Richmond, Virginia, to Doswell, Virginia, with several loaded cars to be delivered to the R. F. & P. R. R. Co. at Doswell, Virginia (a junction point with said railroad), with instructions to pick up certain empty coal cars of the defendant which were at Doswell, Virginia, and bring them to Richmond. At the time of the collision wherein the plaintiff suffered the injuries of which he complains, this latter train had carried and delivered its loaded cars at Doswell, and was collecting the empty cars referred to upon the main track at Doswell, preparatory to forming a train of said empty cars to be hauled back to Richmond to be designated as Extra 596 East.

The train upon which Carnahan was fireman, known as Train No. 97, Engine 199, arrived at Doswell about 2 o'clock A. M. Upon approaching Doswell and before crossing the tracks of the R. F. & P. R. R. Co. at that point it received a signal to stop operated by the telegraph operator in the tower at that point.

Referring to this signal the plaintiff said (Rec., p. 27):

> "We stopped, on the red signal, I should say six or seven minutes; by the time we got the white signal (the signal to proceed) the engineer used the proper signal to call the flag in (*i. e.*, the flagman protecting his train) and the flagman came in and the proper signal was answered and we proceeded with a clear signal. There was no signal for orders. Under those signals, that is, the signal we got, we are supposed to have the main line movement and the right of track for 27 miles."

What the plaintiff meant was that the train had been held up some time by a signal which prevented it proceeding and that after being there six or seven minutes this signal was withdrawn and a signal given to proceed which indicated to the trainmen that the road ahead was clear, and that there were no signals given indicative that the train was to receive any orders at that station. The signals given, however, did not relieve Carnahan or any of the train crew of his train from the duties ordinarily incumbent upon them to look-out ahead, give proper signals and the like.

It appears that this train (No. 97, West bound) had originally been halted by the signal referred to on account of the fact that there were certain cars on the main track at Doswell, being collected there, to be brought back to Richmond that night by the train hereinbefore referred to as Extra 596 East. At this time there was a series or "cut" of cars coupled together, standing on the main track,

some distance west of Doswell Station, just west of a road crossing there. The R. F. & P. crossing is some distance east of the station, a short distance east of the tower, where the telegraph operator was, and the train upon which the plaintiff was fireman was east of the crossing. These cars were standing on the main track without any lights protecting them. The engine of this train was standing on the side track preparatory to shifting some other cars into this "cut" of cars standing on the main track and which were to be taken to Richmond. Carnahan saw this engine and knew a train was at the station, but states he didn't know any cars were standing on the main line.

He then states (Rec., p. 27):

> "Well, after seeing that we had the main line movement, and a clear block—that is, I mean no orders for us, and it indicated to us that we had the block (*i. e.*, clear track) for 27 miles—I had nothing to do but to begin firing the engine; in other words, I hooked the fire over and began to put in a little fire at a time—not but two or three shovelsfull—in order to keep up the pressure and get away from there; it is upgrade and we had a very small engine, of the old type, and it caused constant firing; we had to keep putting in a little coal, one shovelful right after another very nearly, in order to keep up steam and not get stalled and stop to blow up steam. I did that up to the moment the collision occurred, and had just got in a position to get up on the corner of the seat box to reach for the bell cord; I don't remember whether I ever got hold of the bell to give it a pull, and by that time we ran into those cars."

In the collision that followed the plaintiff was caught from his knee of his right leg, down, between the tank on the tender and the boiler head in the cab of his engine and

remained pinned in that position for forty-five or fifty minutes, before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for this injury he brought suit.

The explanation of this catastrophe is as follows:

Upon the approach of train No. 97 at Doswell, the operator there, J. W. Beasley, who was in the tower and who controlled the signals and switches as well, being advised of the fact that there were cars standing on the main track gave the signal which halted the west bound train some distance east of the station. Conductor Shisler, who had charge of the making up of the train which was to leave Doswell for Richmond with the empty cars then being switched to form the train was apprised of the arrival of No. 97 at the signal where it was halted shortly after its arrival. The situation of his train there is explained in his evidence as follows:

He had about fifteen or sixteen cars standing on the main line; the caboose was on the west end of those cars, but there was nothing attached to the east end, the engine being at that time on a side track there. It further appears that there were no lights of any sort on the east end of the cars, that is facing the direction from which train No. 97 approached, and there were no flagmen placed there to protect the cars.

The operator of the tower was fully aware of the fact that the cars were on the main track. Conductor Shisler and Brakeman T. D. Blue, connected with the train crew of the train being made up at Doswell, then went into the tower, or telegraph office, to confer with the operator as to what arrangements were to be made to let train No. 97, which was waiting there, go by the station. What these arrangements were is the subject of a dispute between Conductor Shisler and Brakeman Blue on the one hand and

Operator Beasley on the other. The two latter witnesses testify that Operator Beasley told them he would turn the train standing there (No. 97, west-bound) through a side-track, that is around the cars standing on the main line, and thus allow it to proceed on its route; the operator (Beasley) being able through his levers, etc., to control the switching at that point.

Operator Beasley stated that he understood from the conversation that Conductor Shisler would arrange the switches, etc., to let train No. 97 pass, it appearing that the switches could be as well arranged by some person on the ground as through the instrumentality of the levers in the tower. The gist of the matter seems to be that there was a misunderstanding as to who was to make the arrangements for train No. 97 to pass the cars standing on the track. The result was that Operator Beasley gave train No. 97 a signal to proceed, relying upon Conductor Shisler to arrange for it to pass the cars, and Conductor Shisler and Brakeman Blue, thinking Operator Beasley was going to do this took no precautions whatever to keep the train from running into the cars on the track, the result being the collision referred to. The speed at which train No. 97 was running was ten or fifteen miles an hour.

After leaving the telegraph office or tower Brakeman Blue seems to have gone over on the side track where some cars were standing which were probably presently to be shifted by the engine of his train, then on the same track. He observed the approach of train No. 97 on the main line which had been given a signal to proceed by Operator Beasley and soon saw that a collision was imminent. He then endeavored by calling out and waiving his lantern, to avert the collision, but no one on that train seems to have observed his signals. Had the engineman or the fireman who was injured, Carnahan, observed this warning it appears that they could have probably stopped the train in time to have avoided the accident.

While there was no light of any sort placed as a warning on the cars standing on the track, the engine of train No. 97 was equipped with an oil headlight, the character of which would have enabled the engineman or fireman to have seen the cars standing on the track in time to have stopped before reaching them. It was the duty of the plaintiff to look ahead as far as practicable. He endeavored to explain his failure to observe these cars standing on the track by saying that he was shovelling coal and had not ceased very long before the collision occurred. It appeared that he passed a word with the fireman of the engine standing on the side track there (J. L. Hartman) as he passed that engine, but just what he was doing then is not at all clear.

Just before the collision occurred he was reaching for the bell cord to ring for the crossing beyond which the cars were standing on the track. Even then had he observed the cars it is not improbable a collision could have been averted as the train could have been stopped within at least fifty feet, and the signal for the crossing was necessary to be given some distance from the crossing.

Pleadings, and Trial Proceedings.

The declaration contained four counts. The first two counts charged that plaintiff and defendant were engaged in interstate commerce thus alleging a cause of action under the Employers' Liability Act of Congress. One of these was based upon the alleged negligence of the train crew of the train standing at Doswell under Conductor Shisler's charge. The other was based upon the alleged negligence of Operator Beasley. The other two counts were based upon the same grounds of negligence save that they omitted any allegation as to the parties being engaged in interstate commerce thus alleging a cause of action under the State laws.

There was a demurrer to the declaration based upon the ground that it was improper to combine in one suit a cause of action under the Employers' Liability Act of Congress and the State law. This demurrer the court overruled. It early appeared, in the progress of the trial, that the parties were engaged in interstate commerce at the time the plaintiff was injured so the court instructed the jury eventually, at the instance of the plaintiff, that they should disregard the third and fourth counts of the declaration, *i. e.* those based on a cause of action under the State law.

The case was tried before a regular jury consisting under the State law of only seven men (see appendix) and before the regular panel of nine veniremen had been sworn on their *voir dire*, and before any members of the panel had been stricken off, as allowed by law, the defendant challenged the array of jurors and moved to quash the venire upon the grounds that (1) the jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof and (2) the trial of the case before the jury as summoned, formed, selected and constituted deprived the defendant of rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of the United States passed in pursuance thereof. This motion the court overruled and thereupon the defendant excepted.

After all the evidence in the case had been introduced the plaintiff asked for four instructions, numbered respectively, I, II, III and IV, all of which the court gave. To the giving of the instructions numbered II and III the defendant excepted. The defendant asked for four instructions marked, respectively, (a), (b), (c), and (d). Of these the court gave instructions (a) and (b) and declined to give instructions (c) and (d) to which action of the court the defendant excepted.

After the jury had returned their verdict for the plaintiff for $25,000 damages, the defendant moved the court to set aside the verdict of the jury and award it a new trial upon the grounds that (1) it was contrary to the law and evidence; (2) the jury was misdirected by the court, in its instructions (3) the damages were excessive and (4) the jury was not summoned, selected, formed and constituted in accordance with Article VII of the Amendments of the Constitution of the United States and the laws passed in pursuance thereof. This motion the court overruled and the defendant excepted.

The defendant then moved in arrest of judgment on the ground that the court should have sustained the demurrer to the declaration for the reason that the defendant having been impleaded in an alleged cause of action arising under the Federal law and another under the State law, at the same time, was deprived of rights, privileges and immunities arising from the statutes and Constitution of the United States and was a denial of due process of law. This motion the court overruled, to which action of the court the defendant excepted.

A writ of error was awarded to the judgment of the Circuit Court of Hanover county, by the Supreme Court of Appeals of Virginia, upon several assignments of error, two of which are in substance the same as the two assignments of error relied upon in this court. That court however, affirmed the judgment, but the presiding judge awarded a writ of error to this court.

Assignments of Error.

First. The Supreme Court of Appeals of Virginia erred in holding and deciding that the trial of this case was properly had before a jury of seven men, selected and chosen under the laws of the State of Virginia, and that the said The Chesapeake and Ohio Railway Company was not en-

titled to the trial of said action at law by a jury of twelve men, and in affirming (and not reversing) the ruling of the Circuit Court of the County of Hanover, in this regard.

The said The Chesapeake and Ohio Railway Company seasonably set up and claimed the right to have the case tried by and before a jury of twelve men, under and by virtue of the Constitution of the United States and the laws passed in pursuance thereof, particularly the Seventh Amendment to the Constitution of the United States, and the decision of the Supreme Court of Appeals of Virginia thus deprives the said The Chesapeake and Ohio Railway Company of rights, privileges and immunities, claimed under the Constitution of the United States.

Second. The Supreme Court of Appeals of Virginia erred in holding and deciding that the instruction designated as instruction "III," given to the jury by the judge of the Circuit Court of the County of Hanover, over the objection of the said The Chesapeake and Ohio Railway Company was proper and in affirming (and not reversing) the ruling of the said Circuit Court of the County of Hanover in this regard.

The said instruction was as follows:

> "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, as to them may seem just and fair."

This instruction is objectionable on the following grounds: (a) it allows a recovery in damages not only for the damages proximately resulting from the injury, but also

for "its effects upon his future," which involves a consideration of consequences which might be essentially speculative and remote and for which there could be no recovery in damages and (b) it tells the jury the damages are not to be "in excess of $35,000.00, as to them may seem just and fair," thus pointing out and calling the attention of the jury to a certain sum which they might find as damages and giving judicial approval to that amount, and allows the jury to assess such damages, not exceeding that amount as to them might seem just and fair, without stating that the damages should be only such as were proven by the evidence.

Under the Act of Congress of April 22, 1908, known as the "Employers' Liability Act," a carrier is made "liable in damages" to a person suffering injury under certain conditions therein set forth, for such injuries.

The necessary implication from the language of the act is that the damages for which a defendant is liable are such as appear by the evidence to have proximately resulted from such injuries and such damages as were recoverable for injuries of like character prior to the passage of the act.

Furthermore the damages must necessarily be only such as were proven by the evidence as the act of Congress does not permit a recovery for such a sum as to a jury "seem just and fair."

In the giving of the instruction complained of over the objection of the said The Chesapeake and Ohio Railway Company it was deprived of a right, privilege and immunity claimed under a law of the United States.

ARGUMENT.

(1)

The Circuit Court of the County of Hanover, Virginia sitting with a jury consisting of only seven men was without power to try the case.

As above set out the case was tried, over the defendant's objection, with the regular jury provided for by the laws of Virginia, which consists of only seven men. We believe that in the trial of cases under the Employers' Liability Act of Congress the parties are entitled to a common law jury of twelve men, as provided for by the Seventh Amendment to the Constitution of the United States, and we rely upon the joint brief on that subject filed in the cases now heard together, for argument upon that point.

It may be observed that the State court in this case had it within its power to furnish a jury of twelve men. (See Appendix, Va. Code, section 3158.)

The Virginia courts have held, however, that the allowance or refusal of a special jury of twelve as provided for in this section, is a matter of discretion with the trial judge (*Atlantic and D. R. Co.* v. *Peake*, 87 Va. 130, 12 S. E. 348), and the court so held in the instant case (*C. & O. Ry. Co.* v. *Carnahan*, 86 S. E. 863), and so justified the trial court in its refusal to furnish such a jury (Record p. 72).

For reasons stated in the joint brief it must follow that the trial court had either no discretion in the matter of furnishing a jury of twelve men under that section, or else the court was so constituted as to be incompetent to try the case.

(2)

The instruction numbered "III" as to the measure of damages was erroneous in that it allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35.000; *and allowed the jury to give such sum as damages as to them might "seem just and fair," without stating that the damages could be only such as were proven by the evidence to have proximately resulted from the negligent act complained of.*

This instruction was as follows:

> "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant they may take in consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however in excess of $35,000 as to them may seem just and fair."

In the case of *Central Vermont Ry. Co.* v. *White*, 238 U. S. 512, this court held that Congress, in passing the Federal Employers' Liability Act, evidently intended that the Federal statute should be construed in the light of previous decisions of the Federal courts in all substantive matters, such as for instance, the rule as to burden of proof where contributory negligence is relied upon.

Referring to the latitude allowed State courts in the trial of cases under the act it is there said (238 U. S. 511):

> "As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the State court can, in these and similar instances, follow their own practice even in the trial of suits arising under the Federal law."

But "a substantive right or defense arising the Federal law cannot be lessened or destroyed by a rule of procedure." *Norfolk, &c. R. Co.* v. *Ferebee*, 238 U. S. 269.

See, also, *A. C. L. Ry. Co.* v. *Burnette*, 239 U. S. 199.

If the rule as to the burden of proof on the question of contributory negligence is a matter of substance, it would

likewise seem that the rule as to the proper measure of damages, and the elements thereof, is necessarily one of substance. In fact the contributory negligence of the plaintiff is merely a question involving the measure of damages under the act and if the question of the burden of proof as to an element of damages is a matter of substance, necessarily the elements of damage themselves are such.

By the instruction complained of the plaintiff is allowed to recover among other things for the injury received by him and "its effects upon his future."

By this language the jury were "given occasion for indefinite speculation" and they were invited to "a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts."

Norfolk & W. Co. v. *Holbrook*, 235 U. S. 630;
See, also, *R. & D. R. Co.* v. *Elliott*, 149 U. S. 266, 269;
Boston and A. R. Co. v. *O'Reilly*, 158 U. S. 334.

The language was broad enough to cover not only prospective loss from collateral undertakings, specifically condemned in the case last cited, but also possible future physical effects from the injury, such as future pain and suffering, of which there is no evidence in the record. In fact broader language than that used is hardly conceivable.

In order for a recovery for future pain and suffering to be allowable there must be evidence tending to show that such pain was reasonably certain to result from the injury.

Kennon v. *Gilmer*, 131 U. S. 22, 26:
Washington & G. R. Co. v. *Harman*, 147 U. S. 584;
McDermott v. *Severe*, 202 U. S. 600;
See, also, *Smith* v. *Milwaukee*, 91 Wis. 360;
Block v. *Milwaukee*, 89 Wis. 371;
Ford v. *DesMoines*, 106 Iowa 94;
Shultz v. *Griffith*, 103 Iowa 150;
N. &c. R. Co. v. *Spratley*, 103 Va. 388;
Watson on Per. Inj., section 604, p. 720.

The instruction further invaded the province of the jury by pointing to the sum of $35,000 as the amount to which they could go in estimating damages, without stating that the sum was mentioned merely because it was the amount claimed in the declaration. Thus judicial approval was given to a certain sum which could be found as damages, which was improper.

The Supreme Court of Appeals of Virginia in its opinion recognizes this objection, but holds that the objection was cured by the further statement in the instruction that the damages they might allow should be such as "seem to them just and fair" (Record p. 78).

But this language is in itself highly objectionable.

It is not the province of a jury to allow such damages as "seem to them just and fair," but they can only give the damages proven by the evidence to have been the natural and proximate result of the negligent act complained of.

Milwaukee v. *Kellogg*, 94 U. S. 469;
Sheffer v. *Railroad Co.*, 105 U. S. 249;
Vance v. *Vandercook Co.*, 170 U. S. 468;
Allison v. *Fredericksburg*, 112 Va. 243;
Fowlkes v. *Southern R. Co.*, 96 Va. 464.

The instruction further practically intimates to the jury that the sum of $35,000 was both just and fair, or at least that such a sum was neither unjust nor unfair.

From what has been said it is apparent that the instruction complained of was erroneous and highly prejudicial, and accounts in no small measure for the enormous verdict in this case.

For the reasons set out above we ask that the judgment of the Supreme Court of Appeals of Virginia be reversed.

DAVID H. LEAKE,
WALTER LEAKE,
for The C. & O. Railway Company.

APPENDIX.

PROVISIONS OF THE CONSTITUTION AND STATUTES OF VIRGINIA IN RELATION TO JURY TRIALS.

The Constitution of Virginia, Article I, Section 11:

> "*No person to be deprived of property without due process of law; trial by jury to be held sacred.*
>
> "That no person shall be deprived of his property without due process of law, and in controversies respecting property and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred; but the General Assembly may limit the number of jurors for civil cases in Circuit and Corporation Courts to not less than five in cases now cognizable by justices of the peace or to not less than seven in cases not so cognizable."

Virginia Code, 1904:

> "Sec. 3166.—*Waiver of trial by jury; number of jurors for trial of civil cases.* In any case, unless one of the parties demand that the case be tried by a jury, the whole matter of law and of fact may be heard and determined, and judgment given by the court. In civil cases the jury shall consist of five persons in cases now cognizable by justices of the peace, and of seven in cases not so cognizable. And in any case in which the consent of the plaintiff and defendant shall be entered of record it shall be lawful for the plaintiff to select one person, who is eligible as a juror, and for the defendant to select another, and for the two so selected to select a third of like qualifications, and the three so selected shall con-

stitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven; provided, this section shall not be so construed as to affect in any way the empanelling of special juries as provided in section thirty-one hundred and fifty-eight (1870-71, p. 53; 1902-3-4, p. 605)."

Virginia Code, 1904:

"Sec. 3158—*How Special Juries Formed*—Any court, in a case where a jury is required, may allow a special jury, which shall be formed in the following manner: The court shall order such persons to be summoned, as it shall designate for the purpose, and from those summoned, a panel of twenty qualified jurors, free from just cause of exception, shall be made, from which sixteen shall be chosen by lot. Thereupon, the parties or their counsel, beginning with the plaintiff, shall alternately strike off one from the sixteen so chosen, until the number is reduced to twelve, who shall compose the jury for the trial of the cause. If the parties or their counsel decline or fail to strike off any from the sixteen, or if, after one or more has been stricken off and the number remaining is greater than twelve, the party or his counsel, entitled next in order to strike off, decline or fail to do so, then a jury of twelve for the trial of the cause shall be chosen by lot from the sixteen or the number remaining as aforesaid, as the case may be. (1874, p. 133)."

Virginia Code, 1904:

"Sec. 3154—*Examination of Juror as to Interest, Prejudice, etc.; If Not Indifferent Another to be Supplied.*—The court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein to ascertain whether he is related to either party or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that cause. And in every case the plaintiff and defendant may each challenge one juror peremptorily, where the jury consists of seven. (1852-3, p. 45; 1902-3-4, p. 944; 1904, p. 73)."

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Supreme Court of the United States

OCTOBER TERM, 1915

(Heard with No. 321.)

No. 743

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

ASA P. CARNAHAN

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF OF COUNSEL FOR ASA P. CARNAHAN, DEFENDANT IN ERROR.

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The statement of the case contained in the brief of counsel for plaintiff in error, Chesapeake & Ohio Railway Company sets forth the facts sufficiently and we see no occasion to restate the general facts. Such phases as may require a statement in further detail or modification will be mentioned in connection with the discussion on which they specifically bear.

In this brief we shall adopt the same designation for the parties which is used in brief of plaintiff in error, and also in the opinion of Judge Cardwell of the Court of Appeals of Virginia, that is, the plaintiff in error railway company, being

the defendant in the trial court, will be called the defendant, and the defendant in error, Carnahan, being the plaintiff in the trial court, will be called, the plaintiff.

FIRST ASSIGNMENT OF ERROR.

This assignment of error concerns the jurisdiction of the trial court in view of the provisions of the Virginia Code that in civil cases the jury in cases not cognizable by a justice (whose jurisdiction is limited to $100.00) shall consist of seven.

The Supreme Court of Appeals of Virginia has held that the case was properly tried by a jury of seven, indeed has held that it could be tried in no other way. The court said:

> "How else is a State Court to exercise its jurisdiction in such a case except according to the procedure provided for in its own statutes? The statutes of this state make no provision for a trial in civil cases by a jury of twelve, except for some special reason when a special jury may be summoned under section 3158 of the Code, and the allowance or refusal of a special jury is a matter resting in the sound discretion of the court. A. & D. R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348."

As the question whether a jury of twelve might have been provided under state law, section 3158 (quoted in the brief of the Railway Company Appendix, p. II), is a matter wholly of construction of local statutes and state practice, involving no federal matter, we see no occasion to discuss it further.

The contention presented in this assignment of error, that rights arising under a law of the United States may be enforced only in courts providing methods of trial prescribed by the Constitution of the United States has been discussed somewhat elaborately in a joint brief of counsel for defendants in error in the several cases which are heard with this case. The views there presented are adopted here. It is submitted that the contention is unsound, both in reason and authority, and this assignment of error sould be overruled.

The discussion of the question by the Supreme Court of Appeals found on page 70 of the Record is more elaborate than in any other case in the books and particular attention is drawn to it.

SECOND ASSIGNMENT OF ERROR.

In this assignment of error the plaintiff presents certain objections to the language of Instruction III which concerned damages recoverable by this plaintiff.

This instruction presented the general law on the subject of damages recoverable in actions for personal injuries, so far as applicable to this case. The principles there enunciated are recognized not as peculiar to the law of Virginia, but as conforming to the general law, which is the law in the light of which the Federal Employer's Liability Act is to be construed. There is in this assignment of error no matter of construction of the Employer's Liability Act, or in the words of this court in Yazoo & Miss. Valley R. Co. *v.* Wright, 235 U. S. 376, 59 L. Ed. 277, 278, "there is no contention as to its meaning, hence * * *" it is only necessary to * * * "determine whether plain error was committed in relation to the principles of general law involved."

The instruction was as follows (Printed Record, p. 67):

> "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant they may take in consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, assessing such damages not however in excess of $35,000.00 as to them may seem just and fair."

(1) It is said in the assignment that this instruction "allowed the jury to indulge in speculation and conjecture," and

in the argument in the brief this somewhat intangible specification is more concretely put thus:

> "The language was broad enough to cover not only prospective loss from collateral undertakings * * * but also possible future physical effects from the injury, such as future pain and suffering, of which there is no evidence in the record."

But the instruction must be read and its effect upon the verdict judged in the light of the evidence. Indeed the court so instructed the jury in Instruction IV (Printed Record, p. 67):

> "The court instructs the jury that all the instructions given, are to be read and considered together in the light of all evidence in the case."

To sustain the contention, that under this instruction the jury took into consideration prospective loss from collateral undertakings, it is necessary to say that the jury not only took into consideration matters which were not in evidence, but matters which they were expressly instructed not to consider.

For the court was very careful upon defendant's objection to exclude all evidence of possibility of promotion and of possible increased earnings. See Printed Record, pp. 35, 36. And not a scintilla of evidence tending to prove matters speculative or remote will be found. And more, it appears that the jury were expressly instructed not to take into consideration such matters. On the Printed Record, p. 68, we find that the judge,

> "cautioned counsel when discussing the plaintiff's damages that there was no evidence in the record of the plaintiff's prospects of promotion and orally instructed the jury that they should not take into consideration any probable promotion which might come to the plaintiff or any probable increase in the earning capacity of the plaintiff."

That a court cannot assume that the jury disregarded an instruction is, of course, a fundamental tenet in the orderly administration of justice.

In Graham *v.* U. S., 231 U. S. 474, 58 L. Ed. 319, it is said:

"It would be absurd to upset a verdict upon the speculation that the jury did not do their duty or follow the instructions of the court."

In Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. Ed. 141, 145, the trial court had admitted certain evidence improperly and then instructed the jury that they should disregard it. Of the effect of such an instruction the court said:

"The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. * * * The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be so far as the court is concerned, that the jury were influenced in their verdict only by legal evidence."

In Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50, 58, it was insisted by plaintiffs in error that an instruction which mentioned as an item of damages to be allowed to the plaintiff "the loss of his wages" was obnoxious as permitting the jury to include the total wages which he might have earned, although he was not totally incapacitated. But the court said:

"In the discussion of such questions the courts proceed upon the theory that the jurors are possessed of ordinary intelligence. The language used by the court would naturally be understood as having reference solely to the testimony that had been admitted. The fact is that Hall was not entirely incapacitated from earning wages. His earning capacity was decreased to the extent of his inability to perform labor and earn wages as he might reasonably have been able to do if he had not been injured, and to this extent the jury should take into consideration 'the loss of his wages.'"

Thus the instruction cannot be said to be obnoxious in that under it the jury might have considered prospective loss from collateral undertakings. For there was no evidence in the

record of a conjectural character, and furthermore the jury were specifically and in a most emphatic and dramatic manner instructed "that they should not take into consideration any probable promotion or any probable increase in the earning capacity of the plaintiff."

Of course, counsel do not mean to contend that no consideration should be given by the jury to the effect of the injury upon the plaintiff's future. Future damages must be recovered in this one action. The injury is entire and it is the duty of the jury to assess the plaintiff's entire loss, past and future. While it may be true that any particular loss in future may not be considered as being speculative and remote, it is also true that the jury should consider his loss in future. This distinction is well illustrated in R. & D. Ry. Co. *v.* Elliott, 149 U. S. 266, 37 L. Ed. 728, 731, cited by counsel for defendant railway company. There it was held that the particular losses the plaintiff sustained and his possible promotion could not be considered, but what the future holds for such an one in general, was, of course, to be considered. The court says:

> "Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating in the minds of the jury the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and strength before the injury, his condition since, the business he was doing (Wade *v.* Leroy, 61 U. S. (20 How.) 34 (15: 813); Nebraska City *v.* Campbell, 67 U. S. (2 Black) 590 (17: 271); Vicksburg & M. R. Co. *v.* Putnam, 118 U. S. 545, 554 (30:

257, 258) the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion."

In Denver & Rio Grande R. Co. *v.* Roller, 100 Fed. 738; 41 C. C. A. 22, 34, the trial court gave an instruction that:

"These compensatory damages embrace all damages for bodily and mental pain and suffering which have resulted to said Katherine A. Roller from said injuries; and if said injuries are permanent, or if she has not recovered from them, such damages, also, as you may find from the evidence, it is fair to believe she will suffer from said injury in the future." On exception

Held: "This part of the charge was unquestionably correct. It is, of course, to be considered with reference to the facts, and to previous portions of the charge."

See also, Washington & G. R. Co. *v.* Tobriner (Harmon), 147 U. S. 571, 37 L. Ed. 284; McDermott *v.* Severe, 202 U. S. 600, 610; 50 L. Ed. 1162, 1168; Chesapeake & Ohio R. Co. *v.* Hoff[illegible] 109 Va. 44, 66.

The other phase of the objection to the clause of this instruction relative to future damages is that it was "broad enough to cover all possible future physical effects from the injury such as future pain and suffering of which there is no evidence."

"To read the instruction as including future pain and suffering requires us to supply a predicate of 'its' not in the instruction, i. e., the injury. The evident predicate of 'its' is loss of power and capacity for work." And under this instruction the future damages are confined to those due to loss of power and capacity for work. The Court of Appeals said of this interpretation (Printed Record, p. 77):

"It would be a strained construction of the language of the instruction, 'its effects upon his future,' to hold that it refers to future suffering, and that damages not the proximate result of plaintiff's injuries could have been included under the instruction. Not only so, the instruction enumerated accurately the elements of damages that the jury

were to take into consideration, and at the instance of the defendant the court instructed them 'that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injuries he sustained were the direct and proximate result of the negligence of the defendant.' "

And the particular objection that in the record was no evidence of future pain and suffering is most certainly unfounded. See Printed Record, pp. 29 and 30: The plaintiff at the time of the trial still on occasions suffered pain and attacks of nervousness when he could not sleep; the wound had not healed although the injury had occurred more than a year previous to the trial, and when he attempted the use of an artificial limb, he suffered great pain. Certainly the jury might consider these matters and could with propriety, form conclusions. Expert evidence is not the only evidence in matter of this kind. The facts may be relied upon to speak in matters of this kind with sufficient accuracy. In fact, in Norfolk Ry. Co. *v.* Spratley, 103 Va. 379, *supra,* counsel for the defendant objected to expert evidence as improper.

Nor is direct evidence of future pain and suffering essential to justify the jury in considering future pain and suffering in their estimate of damages.

In Dist. of Col. *v.* Woodberry, 136 U. S. 450; 34 L. Ed. 472, 475, it is said:

" 'All evidence tending to show the character of his ordinary pursuits, and the extent to which the injury complained of prevented him from following those pursuits, was pertiment to the issues,' citing cases. 'The authorities all agree that in cases of this character (personal injury) much latitude must be given to juries in estimating the damages sustained by the person injured. Physical suffering resulting from such injuries, is necessarily attended by mental suffering in a greater or less degree.' "

In Kennon *v.* Gilmer, 131 U. S. 22, 33 L. Ed. 110, 112, it is said:

"The action is for an injury to the person of an intelligent being; and when the injury, whether caused by wilfulness or negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases."

In McDermott *v.* Severe, 202 U. S. 600, 610; 50 L. Ed. 1162, 1168, the jury's duty in connection with future damages is most broadly illustrated. There a child six years old had been so injured that amputation of the leg above the ankle was necessary. The instruction to the jury detailing the elements of damage to be considered was as follows:

"The jury are instructed that, if they find a verdict for the plaintiff, they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put, during the remainder of his life, in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequent of the loss of his leg, and for such pecuniary loss, as the direct result of the injury, which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

The record in that case did not and of course could not disclose directly the mental suffering which a child of six might undergo by reason of embarrassment in the loss of a foot. That depended upon many factors which could not be set forth with certainty, such as temperament when grown, vocation in life, location in the country. Yet it was the duty of the defendant to recompense the plaintiff for that loss and the jury as best they could were instructed to arrive at

it. Certainly much more direct and positive is this record in regard to the pain the plaintiff will suffer for he is a grown man, of formed habits, and for a year at the time of the trial the wound had been healing and he had been undergoing the changes in its condition and its effect upon his system.

In Watson on Personal Injuries, section 387, a textwriter often quoted by the courts (see Norfolk Ry. Co. *v.* Spratley, *supra*) it is said:

> "Specific proof of physical pain is unnecessary. It is sufficiently shown by evidence which discloses the nature, character and extent of the injuries. Nor need the evidence which will warrant a recovery for future pain be direct and positive, if the injury proved is of a nature from which future pain is reasonably certain to result."

Thus it will be seen that the instruction by its terms does not take into consideration future suffering but only future loss due to loss of capacity and power for work. And more, that the record amply justified an instruction broad enough to cover future suffering.

(2) It is further objected that this instruction invaded the province of the jury in that after mentioning the various matters which they might take into consideration, it concluded with the clause, "not in excess of $35,000.00, as to them may seem just and fair." It is contended the mention of the sum in excess of which the jury might not find, stamped that sum with judicial approval as a sum they should find. But so to say, is to strike out the clause "as to them may seem just and fair." For that clause relegated the amount of the damages to the jury and by it the court expressly disclaims any suggestion as to the amount to be found, any intimation in the matter.

In N. & W. R. Co. *v.* Earnest, 229 U. S. 114, 119; 57 L. Ed. 1096, 1100, of a similar contention, the court said:

> "The declaration alleged that the plaintiffs damages amounted to $20,000.00, and prayed judgment for that

sum. One paragraph of the charge to the jury dealt at some length with the question of the measure of damages and contained the statement that if the verdict was for the plaintiff, he should be awarded such an amount of damages, not exceeding $20,000.00 as 'would compensate him for the injury.' An exception was taken to this paragraph, without indicating wherein it was objectionable, and complaint is now made that it erroneously conveyed to the jury an intimation that a finding that the plaintiffs damages amounted to $20,000.00 was justified by the evidence. Looking at the entire paragraph we think it could not have been understood by the jury as conveying such an intimation, and that the words now criticised could only have been understood as marking a limit beyond which the jury could not go. Besides if the defendant entertained any fear that the jury would be misled in that regard, it should in fairness to the court and the plaintiff have called special attention to those words in order that they might be so modified or explained as to leave no doubt of their purpose and meaning."

It is hardly to be believed that the jury were stampeded by the mere mention of the sum of $35,000.00, and proceeded thereupon to disregard both the instructions of the court and the evidence in the case.

It is the common practice, and it is believed proper and necessary, to state in an instruction regarding damages the sum claimed in the declaration which the verdict must not exceed. It is inconceivable that coupled with the definitions of the elements entering into the ascertainment of damage and further with the limitation that such damages should "seem to them just and fair" this mention of the sum of $35,000 should have led the jury to an improper verdict.

But counsel urge that the clause disclaiming any purpose to intimate the sum of $35,000.00, as a criterion receiving judicial sanction, "as to them may seem just and fair," is itself objectionable in that by it, the jury were authorized to find a verdict without reference to the evidence. Here again coun-

sel would put upon language a strange and strained construction. Both words "just" and "fair" are relative and require a determination by reference to a subject matter. That subject matter can only be the evidence. The court in Instruction IV told the jury:

> "The court instructs the jury that all the instructions given, are to be read and considered together in the light of all evidence in the case."

And instruction III in itself throughout relegates the determination of the matters there detailed to the evidence. There is no suggestion anywhere to be found that the jury were to determine any question in the case in any way except by the evidence. Indeed they were sworn to try the case according to the evidence.

The phrase is believed to be altogether usual and it precisely sets forth the true measure of damages in cases of this kind.

In Vicksburg & M. R. Co. *v.* Putnam, 118 U. S. 545, 30 L. Ed. 257, the court said speaking in reference to the use of mortality tables:

> "On the contrary, in the important and much considered case of Phillips *v.* London & S. W. R. above cited (4 Q. B. D. 406; 5 Q. B. D. 78; and 5 C. P. D. 280, S. C. 49 L. J. Q. B. 233) the judges strongly approved the usual practice of instructing the jury in general terms to award *a fair and reasonable compensation,* taking into consideration what the plaintiffs income would probably have been, how long it would have lasted, and all the contingencies, to which it was liable, and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof." (Italics ours).

In St. L. I. M. & S. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129, 146, the court said of an instruction regarding damages:

> "Indeed if after considering all of the evidence they

found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss *according to their own good sense and sound judgment.*" (Italics ours).

Further citation of authority seems unnecessary. The cases cited by counsel for plaintiff in error on page 15, all have to do with the doctrine of proximate cause, which of course must be recognized as applicable here, and which was as fully explained to the jury by Instruction (a) as counsel thought necessary. For they offered no other instruction on the subject.

Counsel intimate that there must be something wrong with this instruction to account for the amount of the verdict. Of course the amount of the verdict is a fact with which this court does not concern itself (St. Louis, I. M. & S. R. Co. *v.* Craft, 237 U. S. 648, 59 L. Ed. 1160). At the same time, it may not be improper to call attention to the fact that there is nothing in the amount of the verdict to show that the jury were guided in arriving at the sum awarded, by any improper motives. The amount is large in one sense, but the injury and pain experienced were most severe and intense. And comparatively the verdict is not startling. See St. Louis, I. M. & S. R. Co. *v.* Craft, supra; Great Northern R. Co. *v.* Otos, U. S. Adv. Ops. 1915, p. 124; Seaboard A. L. R. Co. *v.* Koennecke, U. S. Adv. Ops., p. 126. That inquiry was of course most pertinent in the Court of Appeals and was greatly relied on by counsel. But Judge Cardwell summarizes the evidence thus:

"The injuries sustained by the plaintiff were very severe, and the circumstances connected with the accident and his attendant sufferings were in the highest degree distressing; or, as he, after describing his situation as being caught from his knee down, jammed against the boilerhead for fifty minutes and his leg roasting, on being asked as to his suffering, said 'there is no way to get at that.' Amputation of his leg above the knee,

leaving a stump of about eight or ten inches, followed. To the time of the trial, one year after the injury, the wound had not entirely healed. He had attempted to use an artificial limb but found that impossible, and not only was he thus crippled, but his nervous system was affected so that at times he still suffered pain and could not rest, all of which facts were in a quiet way related by the plaintiff to the jury, the stump of his leg exposed to them that the unhealed wound might be observed by the jurymen.

"The plaintiff was at the time of his injury thirty-two years old, was in the best of health, a man of unusual physique, who could stand the severest sort of labor and perform the arduous duties of a fireman on an engine, as well as and above the average man of his age. He had been in the employ of the defendant as a fireman six and one-half years, both in freight and passenger service, earning at the time of this injury about $100.00 per month, and after the injury and up to the trial of this case he had been unable to earn anything or do anything, as he had no other profession or trade than that he was pursuing when injured."

It is submitted therefore that the instruction criticised, accurately and precisely pointed out to the jury the elements of damage applicable to this case, that both by its terms and by the other instructions with which it must be read, the jury were fully and emphatically confined to the evidence and warned against entering upon regions of speculation and conjecture; that in finding their verdict they were and could be guided by no other matters than the true estimate of damages in such cases.

Respectfully submitted,

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